

10-5-2012

Grabicki v. City of Lewiston Clerk's Record v. 1 Dckt. 40057

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LAW CLERK

Vol. 1 of 4

In the
SUPREME COURT
of the
STATE OF IDAHO

ANTHONY E. GRABICKI, United States Bankruptcy
Trustee, for and on behalf of TIMOTHY K. THOMPSON
and JANET M. THOMPSON, husband and wife,
Plaintiffs,

And

C. BARRY ZIMMERMAN, United State Bankruptcy Trustee,
for and on behalf of THOMPSON'S AUTO SALES, INC., an
Idaho corporation,
Plaintiff-Appellant,

Vs.

CITY OF LEWISTON, a political subdivision of the
State of Idaho,
Defendant-Respondent.

CLERK'S RECORD
VOLUME I

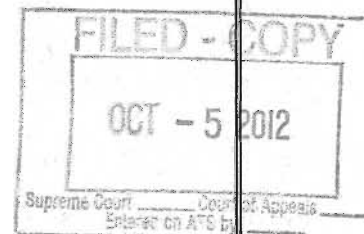
Appealed from the District Court of the
Second Judicial District of the State of Idaho,
in and for the County of Nez Perce

The Honorable CARL B. KERRICK

Supreme Court No. 40057

THEODORE O. CREASON
ATTORNEY FOR APPELLANT

BRIAN K. JULIAN
ATTORNEY FOR RESPONDENT



40057

IN THE SUPREME COURT OF THE STATE OF IDAHO

ANTHONY E. GRABICKI, United)
States Bankruptcy Trustee, for)
And on behalf of TIMOTHY K.)
THOMPSON and JANET M. THOMPSON)
Husband and wife,)
)
Plaintiffs,)
)
And)
)
C. BARRY ZIMMERMAN, United States)
Bankruptcy Trustee, for and on)
Behalf of THOMPSON'S AUTO SALES,)
INC., an Idaho corporation,)
)
Plaintiff-Appellant,)
)
Vs.)
)
CITY OF LEWISTON, a political)
Subdivision of the State of Idaho,)
)
Defendant-Respondent.)

CLERK'S RECORD

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Nez Perce

BEFORE THE HONORABLE CARL B. KERRICK, DISTRICT JUDGE

Counsel for Appellant

Mr. Theodore O. Creason
1219 Idaho St.
P O Drawer 835
Lewiston, ID 83501

Counsel for Respondent

Mr. Brian K. Julian
250 South Fifth St., Suite 700
P O Box 7426
Boise, ID 83707-7426

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ANTHONY E. GRABICKI, United)
States Bankruptcy Trustee, for)
And on behalf of TIMOTHY K.)
THOMPSON and JANET M. THOMPSON)
Husband and wife,)
)
Plaintiffs,)
)
And)
)
C. BARRY ZIMMERMAN, United States)
Bankruptcy Trustee, for and on)
Behalf of THOMPSON'S AUTO SALES,)
INC., an Idaho corporation,)
)
Plaintiff-Appellant,)
)
Vs.)
)
CITY OF LEWISTON, a political)
Subdivision of the State of Idaho,)
)
Defendant-Respondent.)

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ANTHONY E. GRABICKI, United
States Bankruptcy Trustee, for
And on behalf of TIMOTHY K.
THOMPSON and JANET M. THOMPSON
Husband and wife,

Plaintiffs,

And

C. BARRY ZIMMERMAN, United States
Bankruptcy Trustee, for and on
Behalf of THOMPSON'S AUTO SALES,
INC., an Idaho corporation,

Plaintiff-Appellant,

Vs.

CITY OF LEWISTON, a political
Subdivision of the State of Idaho,

Defendant-Respondent.

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
1/29/2007	NCOC	TERESA	New Case Filed-Other Claims Jay P. Gaskill
		TERESA	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: creason moore & dokken Receipt number: 0290508 Dated: 1/29/2007 Amount: \$88.00 (Check) Jay P. Gaskill
	ATTR	TERESA	Plaintiff: Thompson, Tim K Attorney Retained Theodore O Creason Jay P. Gaskill
	COMP	TERESA	Complaint Filed Jay P. Gaskill
	FSUM	TERESA	Summons Filed Jay P. Gaskill
2/15/2007	AFSV	JENNY	Affidavit Of Service - City of Lewiston (Rebecca O'Connor) served 2/9/07 Carl B. Kerrick
3/1/2007		JENNY	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Anderson, Julian & Hull Receipt number: 0292218 Dated: 3/1/2007 Amount: \$58.00 (Check) Carl B. Kerrick
	NOAP	JENNY	Notice Of Appearance - Anderson, Julian & Hull Carl B. Kerrick
	ATTR	JENNY	Defendant: City Of Lewiston Attorney Retained Brian K Julian Carl B. Kerrick
3/5/2007	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33, 34 and 36 Carl B. Kerrick
3/12/2007	NITD	JENNY	Notice Of Intent To Take Default Carl B. Kerrick
3/19/2007	NTSV	JENNY	Notice Of Service - def Carl B. Kerrick
	ANSW	JENNY	Answer and Demand for Jury Trial Carl B. Kerrick
4/16/2007	NTSV	JENNY	Notice Of Service - def Carl B. Kerrick
4/30/2007	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34 - plf Carl B. Kerrick
6/7/2007	STIP	JENNY	Stipulation for Entry of Protective Order Carl B. Kerrick
	ORDR	JENNY	Protective Order Carl B. Kerrick
6/21/2007	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 34 Carl B. Kerrick
	RQSC	JENNY	Plaintiff's Request For Planning and Scheduling Conference Carl B. Kerrick
7/23/2007	NDEP	JENNY	Notice Of Deposition Duces Tecum (Tim K. Thompson) Carl B. Kerrick
7/26/2007	OPSC	JENNY	Order For Telephonic Scheduling Conference Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Telephonic Scheduling Conference 08/10/2007 09:15 AM) Carl B. Kerrick
8/10/2007	HRHD	JENNY	Hearing result for Telephonic Scheduling Conference held on 08/10/2007 09:15 AM: Hearing Held Carl B. Kerrick
	OSTP	JENNY	Order Setting Trial & Pre-trial Conference Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Pretrial Conference 06/13/2008 10:00 AM) Carl B. Kerrick

REGISTER OF ACTIONS

Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
8/10/2007	HRSC	JENNY	Hearing Scheduled (Jury Trial 06/23/2008 09:00 AM) 3-4 days
9/13/2007	NOTP	TERESA	Notice Of Service-plaintiff
10/15/2007	NTSV	JENNY	Notice Of Service - def
10/24/2007	NTSV	JENNY	Notice Of Service - def
11/6/2007	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 34 - plf
11/13/2007	MISC	JENNY	Plaintiffs Disclosure of Expert Witnesses
12/7/2007	NDEP	JENNY	Notice Of Taking 30(b)(6) Deposition of the City of Lewiston
	NDEP	JENNY	Notice Of Taking Deposition of John Watson
12/17/2007	NDEP	JENNY	Amended Notice Of Taking Deposition of John Watson
	NDEP	JENNY	Amended Notice Of Taking 30(b)(6) Deposition of the City of Lewiston
	MISC	JENNY	Defendant City of Lewiston's Disclosure of Expert Witnesses
12/19/2007	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 34
12/28/2007	MOTN	JENNY	Motion for Summary Judgment
	MEMO	JENNY	Memorandum in Support of Motion for Summary Judgment
	AFFD	JENNY	Affidavit of Kari Kuchmak in Support of Defendant's Motion for Summary Judgment
	AFFD	JENNY	Affidavit of John Watson in Support of Defendant's Motion for Summary Judgment
12/31/2007	NTHR	JENNY	Notice Of Hearing
	HRSC	JENNY	Hearing Scheduled (Motion for Summary Judgment 02/05/2008 09:00 AM)
1/10/2008	NDEP	JENNY	Notice Of Deposition Duces Tecum (Roger Tutty)
	NDEP	JENNY	Notice Of Deposition Duces Tecum (Brad Swan)
1/11/2008	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 34
1/14/2008	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 34
1/22/2008	MISC	JENNY	Plaintiffs Response to Defendant's Motion for Summary Judgment
	AFFD	JENNY	Affidavit of Roger Tutty Re: Plaintiff's Response to Defendant's Motion for Summary Judgment
1/29/2008	ORDR	TERESA	Order Setting Hearing
	CONT	TERESA	Continued (Motion for Summary Judgment 02/08/2008 10:00 AM)
1/31/2008	MISC	TERESA	Defendant's Reply Brief in Support Motion for Summary Judgment
	AFFD	TERESA	Affidavit of Chris H. Hansen

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
2/8/2008	ADVS	JENNY	Hearing result for Motion for Summary Judgment held on 02/08/2008 10:00 AM: Case Taken Under Advisement
	MINE	JENNY	Minute Entry Hearing type: Motion for Summary Judgment Hearing date: 2/8/2008 Time: 10:02 am Court reporter: Nancy Towler Audio tape number: DC#2323
3/20/2008	DEOP	JENNY	Memorandum Opinion and Order on Motion for Summary Judgment
	MISC	JENNY	*The City of Lewiston's Motion for Summary Judgment is hereby GRANTED in part and DENIED in part, consistent with the opinion.
4/3/2008	MOTN	JENNY	Plaintiffs Motion for Reconsideration
	AFFD	JENNY	Affidavit of Theodore O. Creason Re: Plaintiffs' Motion for Reconsideration
	AFFD	JENNY	Affidavit of Bud R. Van Stone
	NTHR	JENNY	Notice Of Hearing
	HRSC	JENNY	Hearing Scheduled (Hearing 05/06/2008 09:00 AM) Motion for Reconsideration
4/10/2008	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
4/24/2008	MISC	JENNY	Objection to Plaintiffs' Motion for Reconsideration
	MOTN	JENNY	Motion for Reconsideration
	MEMO	JENNY	Memorandum in Support of Motion for Reconsideration
	AFFD	JENNY	Affidavit of Chris H. Hansen in Support of Motion for Reconsideration
	AFFD	JENNY	Affidavit of Joel Ristau
	AFFD	JENNY	Affidavit of John Watson
	AFFD	JENNY	Affidavit of Lowell J. Cutshaw
	NTHR	JENNY	Notice Of Hearing
	HRSC	JENNY	Hearing Scheduled (Hearing 05/06/2008 09:00 AM) Motion for Reconsideration
4/25/2008	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
4/29/2008	MISC	JENNY	Reply to Objection to Plaintiffs' Motion for Reconsideration and Objection to Defendant's Motion for Reconsideration
	AFFD	JENNY	Affidavit of Tim Thompson in Support of Reply to Objection to Plaintiffs' Motion for Reconsideration and Objection to Defendant's Motion for Reconsideration
	AFFD	JENNY	Affidavit of Theodore O. Creason
	AFFD	JENNY	Affidavit of Janice Vassar
	AFFD	JENNY	Affidavit of Jeff Nessel

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User		Judge
4/29/2008	AFFD	JENNY	Affidavit of Kevin Poole	Carl B. Kerrick
	AFFD	JENNY	Affidavit of Richard McMillen	Carl B. Kerrick
5/2/2008	HRVC	JENNY	Hearing result for Hearing held on 05/06/2008 09:00 AM: Hearing Vacated Plaintiffs Motion for Reconsideration	Carl B. Kerrick
	HRVC	JENNY	Hearing result for Hearing held on 05/06/2008 09:00 AM: Hearing Vacated Defendants Motion for Reconsideration	Carl B. Kerrick
5/8/2008	MOTN	JENNY	Motion for Protective Order	Carl B. Kerrick
	MEMO	JENNY	Memorandum in Support of Motion for Protective Order	Carl B. Kerrick
	AFFD	JENNY	Affidavit of Chris H. Hansen in Support of Motion for Protective Order	Carl B. Kerrick
5/9/2008	AFFD	JENNY	Substituted Affidavit of Chris H. Hansen in Support of Motion for Protective Order	Carl B. Kerrick
	NTHR	JENNY	Notice Of Hearing	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 05/20/2008 09:00 AM) Motion for Protective Order	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 05/20/2008 09:00 AM) Def's Motion for Reconsideration	Carl B. Kerrick
	NTHR	JENNY	Amended Notice Of Hearing	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 05/20/2008 09:00 AM) Plf's Motion for Reconsideration	Carl B. Kerrick
5/13/2008	MISC	JENNY	Reply in Support of Defendant's Motion for Reconsideration	Carl B. Kerrick
5/16/2008	MISC	JENNY	Plaintiffs' Response to Defendant's Motion for Protective Order	Carl B. Kerrick
	AFFD	JENNY	Affidavit of Roger Tutty, PE/LS	Carl B. Kerrick
5/19/2008	NTSV	JENNY	Notice Of Service - def	Carl B. Kerrick
5/20/2008	MINE	JENNY	Minute Entry Hearing type: Mtn for Reconsideration(plf/def) /Mtn for P.O. Hearing date: 5/20/2008 Time: 9:00 am Court reporter: Linda Carlton Audio tape number: DC#2336	Carl B. Kerrick
	ADVS	JENNY	Hearing result for Hearing held on 05/20/2008 09:00 AM: Case Taken Under Advisement Plf's Motion for Reconsideration	Carl B. Kerrick
	ADVS	JENNY	Hearing result for Hearing held on 05/20/2008 09:00 AM: Case Taken Under Advisement Def's Motion for Reconsideration	Carl B. Kerrick
	ADVS	JENNY	Hearing result for Hearing held on 05/20/2008 09:00 AM: Case Taken Under Advisement Motion for Protective Order	Carl B. Kerrick
	DCHH	JENNY	District Court Hearing Held Court Reporter: Linda Carlton	Carl B. Kerrick
	REGISTER OF ACTIONS		Number of Transcript Pages for this hearing estimated: less than 100 pages	

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
5/20/2008	HRVC	JENNY	Hearing result for Pretrial Conference held on 06/13/2008 10:00 AM: Hearing Vacated
	HRVC	JENNY	Hearing result for Jury Trial held on 06/23/2008 09:00 AM: Hearing Vacated 3-4 days
6/17/2008	DEOP	JENNY	Memorandum Opinion and Order on Cross Motions for Reconsideration
	MISC	JENNY	Plaintiff's Motion for Reconsideration is DENIED
	MISC	JENNY	Defendants' Motion for Reconsideration is DENIED
	MISC	JENNY	Defendants' Motion for Protective Order is DENIED
7/2/2008	MOTN	JENNY	Plaintiff's Motion for Permissive Appeal
	MOTN	JENNY	Motion for Permissive Appeal
	NTHR	JENNY	Notice Of Hearing
	HRSC	JENNY	Hearing Scheduled (Hearing 07/29/2008 09:00 AM) Motion for Permissive Appeal
7/16/2008	MISC	JENNY	Response to Plaintiffs' Motion for Permissive Appeal
7/22/2008	MISC	JENNY	Reply to Defendant's Response to Plaintiffs' Motion for Permissive Appeal
7/24/2008	ORDR	JENNY	Order Setting Hearing
	CONT	JENNY	Hearing result for Hearing held on 07/29/2008 09:00 AM: Continued Motion for Permissive Appeal
	HRSC	JENNY	Hearing Scheduled (Hearing 08/07/2008 09:00 AM) Motion for Permissive Appeal
8/7/2008	GRNT	JENNY	Hearing result for Hearing held on 08/07/2008 09:00 AM: Motion Granted Motion for Permissive Appeal
	MINE	JENNY	Minute Entry Hearing type: Motion for Permissive Appeal Hearing date: 8/7/2008 Time: 9:00 am Court reporter: Nancy Towler Audio tape number: DC#2340
8/21/2008	ORDR	JENNY	Order Granting Permissive Appeal
9/2/2008	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
9/12/2008	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
10/21/2008	RQSC	JENNY	Plaintiffs' Request for Planning and Scheduling Conference and Trial Setting
10/30/2008	SCRT	DEANNA	Supreme Court Receipt - Order Denying Motion for Acceptance of Appeal by Permission
11/18/2008	OPSC	JENNY	Order For Telephonic Scheduling Conference
	HRSC	JENNY	Hearing Scheduled (Telephonic Scheduling Conference 11/26/2008 11:00 AM)

REGISTER OF ACTIONS

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
11/26/2008	HRHD	JENNY	Hearing result for Telephonic Scheduling Conference held on 11/26/2008 11:00 AM: Hearing Held
	OSTP	JENNY	Order Setting Trial & Pre-trial Conference
	HRSC	JENNY	Hearing Scheduled (Pretrial Conference 10/09/2009 11:00 AM)
	HRSC	JENNY	Hearing Scheduled (Jury Trial 10/19/2009 09:00 AM) 4-5 days
2/25/2009	MISC	TERESA	Plaintiff's Disclosure of Expert Witnesses
2/27/2009	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
3/16/2009	NTSV	JENNY	Notice Of Service - def
4/22/2009	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
4/29/2009	MISC	JENNY	Defendant's Supplemental Disclosure of Expert Witnesses
5/1/2009	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 34
5/18/2009	NDEP	JENNY	Notice Of Deposition Duces Tecum of D. Richard Wyatt
	NDEP	JENNY	Notice Of Deposition Duces Tecum of Bud VanStone
	NDEP	JENNY	Notice Of Deposition Duces Tecum of David Witthaus
5/29/2009	NTSV	JENNY	Notice Of Service - def
9/2/2009	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 34 and 36
9/3/2009	MOTN	JENNY	Motion in Limine
	MEMO	JENNY	Memorandum in Support of Motion in Limine
	NTHR	JENNY	Notice Of Hearing
	HRSC	JENNY	Hearing Scheduled (Motion in Limine 10/09/2009 11:00 AM)
9/8/2009	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
9/10/2009	MOTN	JENNY	Plaintiff's Motion to Amend Complaint Specifying Equitable Relief from Nuisance, Trespass and Damages to Include Attorney Fees
	NTHR	JENNY	Notice Of Hearing Re: Plaintiff's Motion to Amend Complaint Specifying Equitable Relief From Nuisance, Trespass and Damages to Include Attorney Fees
	HRSC	JENNY	Hearing Scheduled (Hearing 09/29/2009 09:00 AM) Motion to Amend Complaint
9/18/2009	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34
9/21/2009	MISC	JENNY	Objection to Plaintiffs' Motion to Amend Complaint
	MISC	JENNY	Defendant's Second Supplemental Disclosure of Expert Witnesses

REGISTER OF ACTIONS

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
9/24/2009	MISC	JENNY	Defendant's Third Supplemental Disclosure of Expert Witnesses
	MISC	JENNY	Plaintiff's Response to Defendant's Motion in Limine
9/25/2009	MOTN	JENNY	Defendant's Second Motion in Limine
	MISC	JENNY	Plaintiffs' Reply to Defendant's Objection to Motion to Amend Complaint
9/29/2009	ADVS	JENNY	Hearing result for Hearing held on 09/29/2009 09:00 AM: Case Taken Under Advisement Motion to Amend Complaint
	MINE	JENNY	Minute Entry Hearing type: Motion to Amend Complaint Hearing date: 9/29/2009 Time: 9:00 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: JENNY Tape Number: CTRM #1 TED CREASON FOR PLAINTIFF CHRIS HANSEN FOR DEFENDANT
	MISC	JENNY	Plaintiff's Response to Defendant's Second Motion in Limine
10/6/2009	NTSV	JENNY	Notice Of Service - def
10/7/2009	MEMO	JENNY	Reply Memorandum Concerning the Defendant's Second Motion in Limine
10/9/2009	HRVC	JENNY	Hearing result for Motion in Limine held on 10/09/2009 11:00 AM: Hearing Vacated
	HRHD	JENNY	Hearing result for Pretrial Conference held on 10/09/2009 11:00 AM: Hearing Held
	HRVC	JENNY	Hearing result for Jury Trial held on 10/19/2009 09:00 AM: Hearing Vacated 4-5 days
	MINE	JENNY	Minute Entry Hearing type: Pretrial/Motion in Limine Hearing date: 10/9/2009 Time: 11:36 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: JENNY Tape Number: CTRM #1 TED CREASON FOR PLAINTIFF BRIAN JULIAN FOR DEFENDANT
	DCHH	JENNY	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages
	MISC	JENNY	Plaintiff's Exhibit List
	MISC	JENNY	Plaintiff's Witness List
	MISC	JENNY	Pre-Trial Statement - def

Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User		Judge
10/9/2009	MISC	JENNY	Defendant's Trial Witness List	Carl B. Kerrick
	MISC	JENNY	Defendant's Trial Exhibit List	Carl B. Kerrick
10/15/2009	ORDR	JENNY	Order Allowing Plaintiffs to File Amended Complaint	Carl B. Kerrick
	AMCO	JENNY	Plaintiffs' Amended Complaint Specifying Equitable Relief from Nuisance, Trespass and Damages to Include Attorney Fees or Alternatively Just Compensation	Carl B. Kerrick
10/23/2009	MISC	JENNY	Offer of Proof	Carl B. Kerrick
	MISC	JENNY	Plaintiffs' Proposed Stipulations of Fact, Admission of Exhibits and Publication of Deposition Testimony	Carl B. Kerrick
11/5/2009	ANSW	JENNY	Answer to Amended Complaint and Demand for Jury Trial	Carl B. Kerrick
	MISC	JENNY	Objection to Offer Of Proof and Plaintiffs' Proposed Stipulation of Facts, Admission of Exhibits and Publication of Deposition Testimony and Proposed Pretrial Order	Carl B. Kerrick
11/18/2009	MISC	JENNY	Plaintiffs' Response to Defendant's Objection to Offer of Proof and Plaintiffs' Proposed Stipulation of Facts, Admission of Exhibits and Publication of Deposition Testimony and Proposed Pretrial Order	Carl B. Kerrick
	ORSC	JENNY	Order for Telephonic Status Conference	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Telephonic Status Conference 12/04/2009 09:00 AM)	Carl B. Kerrick
12/1/2009	ORSC	JENNY	Amended Order for Telephonic Status Conference	Carl B. Kerrick
	CONT	JENNY	Hearing result for Telephonic Status Conference held on 12/04/2009 09:00 AM: Continued	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Telephonic Status Conference 01/19/2010 11:00 AM)	Carl B. Kerrick
1/15/2010	HRVC	JENNY	Hearing result for Telephonic Status Conference held on 01/19/2010 11:00 AM: Hearing Vacated	Carl B. Kerrick
1/19/2010	ORSC	JENNY	Second Amended Order for Telephonic Status Conference	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Telephonic Status Conference 02/05/2010 09:00 AM)	Carl B. Kerrick
2/8/2010	HRHD	JENNY	Hearing result for Telephonic Status Conference held on 02/05/2010 09:00 AM: Hearing Held	Carl B. Kerrick
2/10/2010	NTSV	JENNY	Notice Of Service - def	Carl B. Kerrick
11/8/2010	RQSC	JENNY	Plaintiff's Request For Planning and Scheduling Conference	Carl B. Kerrick
	MOTN	JENNY	Motion to Substitute C. Barry Zimmerman, Trustee for Thomson Auto Sales, Inc.	Carl B. Kerrick

REGISTER OF ACTIONS

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User		Judge
11/10/2010	ORDR	JENNY	Order Granting Motion to Substitute C. Barry Zimmerman, Trustee for Thompson Auto Sales, Inc.	Carl B. Kerrick
11/15/2010	NTSV	JENNY	Notice Of Service - def	Carl B. Kerrick
11/23/2010	OPSC	JENNY	Order For Telephonic Scheduling Conference	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Telephonic Scheduling Conference 12/07/2010 11:00 AM)	Carl B. Kerrick
12/7/2010	HRHD	JENNY	Hearing result for Telephonic Scheduling Conference held on 12/07/2010 11:00 AM: Hearing Held	Carl B. Kerrick
	OSTP	JENNY	Order Setting Trial & Pre-trial Conference	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Pretrial Conference 11/04/2011 10:00 AM)	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Jury Trial 11/14/2011 09:00 AM)	Carl B. Kerrick
12/30/2010	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33 and 34	Carl B. Kerrick
1/10/2011	MISC	JENNY	Protective Order	Carl B. Kerrick
1/21/2011	NTSV	JENNY	Notice Of Service - def	Carl B. Kerrick
3/7/2011	NTSV	JENNY	Notice Of Service Pursuant to I.R.C.P. 33, 34 and 36	Carl B. Kerrick
3/18/2011	MISC	JENNY	Plaintiff's Disclosure of Expert Witnesses	Carl B. Kerrick
5/12/2011	DCWT	JENNY	Defendant City of Lewiston's Supplemental Disclosure Of Expert Witnesses	Carl B. Kerrick
7/15/2011	MOTN	JENNY	Second Motion for Summary Judgment	Carl B. Kerrick
	MEMO	JENNY	Memorandum in Support of Second Motion for Summary Judgment	Carl B. Kerrick
	AFFD	JENNY	Second Affidavit of Kari Ravencroft (Formerly Kuchmak) in Support of Defendant's Second Motion for Summary Judgment	Carl B. Kerrick
	AFFD	JENNY	Affidavit of Dan Anderson in Support of Defendants' Second Motion for Summary Judgment	Carl B. Kerrick
	AFFD	JENNY	Second Affidavit of Chris H. Hansen in Support of Second Motion for Summary Judgment Document sealed	Carl B. Kerrick
	NTHR	JENNY	Notice Of Hearing	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 08/23/2011 09:00 AM) Second Motion for Summary Judgment	Carl B. Kerrick
7/22/2011	NTSV	JENNY	Notice Of Service - def	Carl B. Kerrick
8/2/2011	NOTC	JENNY	Notice of Substitution of Anthony E. Grabicki, Trustee, for Tim K. Thompson and Janet M. Thompson	Carl B. Kerrick

Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
8/2/2011	NOTC	JENNY	Notice of Substitution of Anthony E. Grabicki, Trustee, for Tim K. Thompson and Janet M. Thompson
8/8/2011	MEMO	JENNY	Memorandum in Opposition to Defendant's Second Motion for Summary Judgment
	MOTN	JENNY	Motion to Strike Affidavit of Dan Anderson Filed in Support of Defendant's Second Motion for Summary Judgment
	NTHR	JENNY	Notice Of Hearing Re: Motion to Strike Affidavit of Dan Anderson Filed in Support of Defendant's Second Motion for Summary Judgment
	HRSC	JENNY	Hearing Scheduled (Hearing 08/23/2011 09:00 AM) Motion to Strike
	ORDR	JENNY	Order Substituting Anthony E. Grabicki, Trustee, for Tim K. Thompson and Janet M. Thompson
8/15/2011	MISC	JENNY	Response to Reply Brief Re: Second Motion for Summary Judgment
	MISC	JENNY	Response to Motion to Strike Affidavit of Dan Anderson
	AFFD	JENNY	Affidavit of Brian K. Julian
	NTHR	JENNY	Amended Notice Of Telephonic Hearing
8/23/2011	HRHD	JENNY	Hearing result for Telephonic Motion Hearing scheduled on 08/23/2011 09:00 AM: Hearing Held Second Motion for Summary Judgment
	HRHD	JENNY	Hearing result for Hearing scheduled on 08/23/2011 09:00 AM: Hearing Held Motion to Strike
	DCHH	JENNY	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages
	MINE	JENNY	Minute Entry Hearing type: Motion for Summary Judgment/Mtn Strike Hearing date: 8/23/2011 Time: 9:03 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: JENNY Tape Number: CTRM #1 TED CREASON FOR PLAINTIFF CHRIS HANSEN FOR DEFENDANT
8/31/2011	ADVS	JENNY	Case Taken Under Advisement
9/26/2011	DEOP	JENNY	Memorandum Opinion and Order on Second Motion for Summary Judgment
	HRVC	JENNY	Hearing result for Jury Trial scheduled on 11/14/2011 09:00 AM: Hearing Vacated
9/30/2011	REGISTER OF ACTIONS MOTN	JENNY	Plaintiff's Motion for Clarification

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User		Judge
10/7/2011	NTHR	JENNY	Notice Of Hearing	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 11/15/2011 09:00 AM) plf motion for clarification	Carl B. Kerrick
	MOTN	JENNY	Motion for Reconsideration - plf	Carl B. Kerrick
	NTHR	JENNY	Notice Of Hearing	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 11/15/2011 09:00 AM) plf motion for reconsideration	Carl B. Kerrick
	HRVC	JENNY	Hearing result for Pretrial Conference scheduled on 11/04/2011 10:00 AM: Hearing Vacated	Carl B. Kerrick
10/20/2011	NTHR	JENNY	Amended Notice Of Hearing Re: Plaintiffs' Motion for Reconsideration	Carl B. Kerrick
	CONT	JENNY	Hearing result for Hearing scheduled on 11/15/2011 09:00 AM: Continued plf motion for clarification	Carl B. Kerrick
	CONT	JENNY	Hearing result for Hearing scheduled on 11/15/2011 09:00 AM: Continued plf motion for reconsideration	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 11/22/2011 09:00 AM) motion for reconsideration	Carl B. Kerrick
10/28/2011	MISC	JENNY	Objection to Plaintiffs' Motion for Clarification and Motion for Reconsideration	Carl B. Kerrick
11/18/2011	NTHR	JENNY	Second Amended Notice Of Hearing Re: Plaintiff's Motion for Reconsideration	Carl B. Kerrick
	CONT	JENNY	Hearing result for Hearing scheduled on 11/22/2011 09:00 AM: Continued motion for reconsideration	Carl B. Kerrick
	HRSC	JENNY	Hearing Scheduled (Hearing 01/03/2012 09:00 AM) Motion for Reconsideration	Carl B. Kerrick
1/3/2012	ADVS	JENNY	Hearing result for Hearing scheduled on 01/03/2012 09:00 AM: Case Taken Under Advisement Motion for Reconsideration	Carl B. Kerrick
	DCHH	JENNY	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages	Carl B. Kerrick
	MINE	JENNY	Minute Entry Hearing type: Motion for Reconsideration Hearing date: 1/3/2012 Time: 9:04 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: JENNY Tape Number: CTRM #1 SAM CREASON FOR PLAINTIFF CHRIS HANSEN FOR DEFENDANT	Carl B. Kerrick
1/17/2012	DEOP	JENNY	Memorandum Opinion and Order on Plaintiffs' Motion for Clarification and Motion for Reconsideration	Carl B. Kerrick

Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
1/17/2012	MISC	JENNY	**Plf's Motion for Clarification is GRANTED. Plf's Motion for Reconsideration is GRANTED**
2/17/2012	MEMC	JENNY	Memorandum Of Costs
2/29/2012	JDMT	JENNY	Judgment
	MISC	JENNY	Objection to Defendant's Memorandum of Costs
	AFFD	JENNY	Affidavit of Theodore O. Creason Re: Objection to Defendant's Memorandum of Costs
3/12/2012	MISC	JENNY	Reply to Objection of Costs as a Matter of Right
	AFFD	JENNY	Supplemental Affidavit of Chris H. Hansen Re: Costs
4/30/2012	DEOP	JENNY	Memorandum Opinion and Order on Defendant's Motion for Costs
	JDMT	JENNY	Amended Judgment
	CDIS	JENNY	Civil Disposition entered for: City Of Lewiston, Defendant; Thompson Auto, Plaintiff; Thompson, Timothy K, Plaintiff; Thompsons Auto & Marine Sales Inc, Plaintiff. Filing date: 4/30/2012
	STAT	JENNY	Case Status Changed: Closed
6/7/2012	NTAP	DEANNA	Notice Of Appeal
		DEANNA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Creason, Theodore O (attorney for Thompson, Timothy K) Receipt number: 0009642 Dated: 6/8/2012 Amount: \$101.00 (Check) For: Thompsons Auto & Marine Sales Inc (plaintiff)
	APSC	DEANNA	Appealed To The Supreme Court
	NTAP	DEANNA	Notice Of Appeal
6/8/2012	BNDC	DEANNA	Bond Posted - Cash (Receipt 9640 Dated 6/8/2012 for 580.00)
	BONC	DEANNA	Condition of Bond Estimate for Clerk's Record and Reporter's Transcripts
6/13/2012	MOTN	JENNY	Plaintiffs Motion for Relief from Judgment Pursuant to Idaho Rule of Civil Procedure 60(b)
	MEMO	JENNY	Memorandum in Support Re: Plaintiffs' Motion for Relief from Judgment Pursuant to Idaho Rule of Civil Procedure 60(b)
	AFFD	JENNY	Affidavit of Theodore O. Creason Re: Rule 60(b) Motion
	NTHR	JENNY	Notice Of Hearing Re: Plaintiff's Motion for Relief from Judgment Pursuant to Idaho Rule of Civil Procedure
	HRSC	JENNY	Hearing Scheduled (Hearing 07/03/2012 09:00 AM) Motion for Relief from Judgment

REGISTER OF ACTIONS

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Timothy K Thompson, Thompson Auto, Thompsons Auto & Marine Sales Inc vs. City Of Lewiston

Date	Code	User	Judge
6/14/2012		JENNY	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: creason moore dokken & geidl Receipt number: 0009906 Dated: 6/14/2012 Amount: \$2.00 (Check)
6/21/2012	SCRT	DEANNA	Supreme Court Receipt - Notice of Appeal filed at the SC
6/26/2012	MISC	JENNY	Objection and Memorandum in Opposition to Plaintiffs' Motion to Set Aside Default Judgment
	AFFD	JENNY	Affidavit of Chris H. Hansen
7/3/2012	MINE	JENNY	Minute Entry Hearing type: Motion For Relief From Judgment Hearing date: 7/3/2012 Time: 9:04 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: JENNY Tape Number: CTRM #1 TED CREASON & SAM CREASON FOR PLAINTIFF CHRIS HANSEN FOR DEFENDANT
	GRNT	JENNY	Hearing result for Hearing scheduled on 07/03/2012 09:00 AM: Motion Granted Motion for Relief from Judgment
	DCHH	JENNY	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated:less than 100 pages
7/5/2012	ORDR	JENNY	Order Granting Plaintiffs' Motion for Relief From Judgment Pursuant to Idaho Rule of Civil Procedure
7/6/2012	BNDO	DEANNA	Bond Converted to Other Party (Transaction number 1028 dated 7/6/2012 amount 214.50)
7/26/2012	BNDO	DEANNA	Bond Converted to Other Party (Transaction number 1113 dated 7/26/2012 amount 123.50)
7/31/2012	NTAP	DEANNA	Amended Notice of Appeal
8/2/2012	SCRT	DEANNA	Supreme Court Receipt -Clerk's Certificate of Appeal filed, Record and Transcript due at the SC by August 27, 2012
8/15/2012	MISC	DEANNA	SC received the Amended Notice of Appeal

Theodore O. Creason, ISB # 1563
CREASON, MOORE & DOKKEN, PLLC
1219 Idaho Street
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Lewiston, ID 83501
(208) 743-1516
Fax: (208) 746-2231
Attorneys for Plaintiffs

FILED
2007 JAN 29 AM 10 02

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY
[Signature]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually, and THOMPSON'S AUTO
SALES, INC., an Idaho corporation,
Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision in the State of Idaho,
Defendant.

Case No. **CV07 00200**
**COMPLAINT AND DEMAND
FOR JURY TRIAL**

Fee Category: A.1
Fee: \$88.00

COME NOW the plaintiffs, Tim K. Thompson and Janet M. Thompson, husband and wife, individually, and Thompson's Auto Sales, Inc., by and through their attorney of record, Theodore O. Creason, and for cause of action against the defendant, allege and complain as follows:

I.

Plaintiffs, Tim K. Thompson and Janet M. Thompson, husband and wife, were and at all times relevant to this Complaint, residents of the State of Idaho and owners of certain real property located at 306 21st Street, Lewiston, Idaho 83501, more particularly described as:

PARCEL 1:

The West $\frac{3}{4}$ of Lot 3 and all of Lot 4, Block 14, Mrs. S. C. Thompson's Second Addition to the City of Lewiston, according to the recorded plat thereof, recorded in Book 1 of Plats, page 151, records of Nez Perce County, Idaho.

PARCEL 2:

Lots 1 and 2, and the East $12\frac{1}{2}$ feet of Lot 3, Block 14, Mrs. S.C. Thompson's Second Addition to the City of Lewiston, according to the recorded plat thereof, records of Nez Perce County, Idaho.

EXCEPTING THEREFROM:

A portion of land located in Lot 1 of Block 14 of Mrs. S.C. Thompson's Second Addition to the City of Lewiston, per the recorded plat thereof, also being in Section 31, Township 36 North, Range 5 West of the Boise Meridian, City of Lewiston, County of Nez Perce, Idaho, and more particularly described as follows:

Beginning at the Southeast corner of Lot 1, said point also being on the West right of way of 21st Street; thence North $00^{\circ}10'00''$ East along the East line of said Lot 1, a distance of 12.19 feet; thence South $56^{\circ}14'43''$ West, a distance of 26.59 feet to a point on the South line of said Lot 1, said point also being on the North right of way line of Idaho Street; thence North $83^{\circ}19'00''$ East along said South line of Lot 1, a distance of 22.22 feet to the POINT OF BEGINNING.

PARCEL 3:

Lot 5, Block 14, Thompson's Second Addition to the City of Lewiston, according to the recorded plat thereof, records of Nez Perce County, Idaho.

Thompson's Auto Sales, Inc., an Idaho corporation, operates a car sales lot at 306 21st Street, Lewiston, Idaho 83501.

II.

Defendant, City of Lewiston, is a political subdivision of the State of Idaho as defined by Idaho Code § 6-902.

III.

That jurisdiction and venue is proper in the District Court of the Second Judicial District in and for the County of Nez Perce pursuant to Idaho Code § 6-915.

IV.

Plaintiffs filed a Notice of Tort Claim against the City of Lewiston on October 26, 2006, and a Supplementation of Notice of Tort Claim against the City of Lewiston on January 3, 2007.

V.

On May 19, 2006, water from defendant's storm drain system failed to contain the storm water causing a flood over and across the property of Thompson's Auto Sales, located at 306 21st Street, Lewiston, Idaho, and causing a breach in and significant damage to the concrete wall located in the NW corner of the property. The concrete wall provides the lateral support for plaintiffs' business property, and as a result of the water flow a significant portion of plaintiffs' cat lot was rendered useless and dangerous.

VI.

Defendant was negligent in the design, maintenance, or operation of its storm drain system and such negligence was the proximate cause of the plaintiffs' damages herein alleged.

VII.

That following the flood of water from defendant's storm drain system, the plaintiffs attempted to begin immediate remedial measures which included shoring up the existing wall

with 45° concrete structures and landscaping, but the remediation project was red tagged by the defendant.

VIII.

Despite requests and demands for assistance, the defendant has failed and refused to provide meaningful cooperation with plaintiffs in their efforts to mitigate damages, and have thwarted plaintiffs' efforts to return the damaged property to a useable car lot.

IX.

As a direct and proximate result of the conduct of the defendant, its agents and employees, plaintiffs have suffered business interruption damages, mitigation costs, and associated professional fees to date in the amount of Eighty-Seven Thousand Two Hundred Thirty-One and no/100 Dollars (\$87,231.00), all of which are continuing.

X.

That defendant by and through Trident Insurance Services, its authorized agents, has denied plaintiffs' claim without a reasonable investigation and without a reasonable basis in law or fact forcing plaintiffs to commence legal action and to engage the services of Creason, Moore & Dokken, PLLC to represent them in this matter. Pursuant to Idaho Code § 12-117, plaintiffs are entitled to a reasonable sum as and for attorney fees incurred herein, plus costs of this suit.

WHEREFORE, plaintiffs pray as follows:

1. That plaintiffs be awarded business interruption damages, mitigation costs, and associated professional fees to date in the amount of Eighty-Seven Thousand Two Hundred Thirty-One and no/100 Dollars (\$87,231.00) and such additional sums as may be proven at trial.
2. That plaintiffs be awarded costs and disbursements necessarily expended in bringing this action.

3. That plaintiffs be awarded reasonable attorney fees pursuant to Idaho Code § 12-117.

4. That plaintiffs be awarded such other and further relief as the Court may deem just and equitable in the premises.

DATED this 26th day of January, 2007.

CREASON, MOORE & DOKKEN, PLLC



Theodore O. Creason, ISB # 1563

Attorney for Plaintiffs

Tim K. Thompson and Janet M. Thompson,
and Thompson's Auto Sales, Inc.

DEMAND FOR JURY TRIAL

The plaintiffs demand a trial of all issues of this case by a jury composed of not less than twelve jurors.

DATED this 26th day of January, 2007.



Theodore O. Creason, ISB # 1563

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FATTY O'NEILL
CLERK OF THE DIST. COURT
DEPUTY

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Amy G. White – ISB No. 5019
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Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually and doing business as
THOMPSON'S AUTO SALES, INC., an
Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision of the State of Idaho,

Defendant.

Case No. CV07-00200

**ANSWER AND DEMAND FOR
JURY TRIAL**

COMES NOW the above entitled Defendant, by and through its attorney of
record, Anderson, Julian & Hull, LLP, and Hereby Answers Plaintiff's Complaint as
Follows:

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I.

Defendant denies each and every allegation of Plaintiffs' Complaint not herein expressly and specifically admitted.

II.

Defendant admits paragraphs II and III of Plaintiffs' Complaint.

III.

This Defendant is without sufficient knowledge to determine the truth of the averments contained in paragraphs I of Plaintiffs' Complaint. With respect to paragraph IV of Plaintiff's Complaint, this Defendant acknowledges that on October 26, 2006, the Plaintiffs filed a Notice of Tort Claim. This Defendant also acknowledges that on January 3, 2006, the Plaintiffs filed a document entitled a Supplemental Notice of Tort Claim. By admitting to receipts of the documents entitled Notice of Tort Claims and the Supplemental Notice of Tort Claim, this Defendant does not admit or acknowledge that either document complies with or adheres to Idaho law.

IV.

With regard to paragraph V of Plaintiffs' Complaint, Defendant admits only that as a result of a significant rainfall on May 19, 2006, storm water was flowing through the storm drain. The Defendant denies the remainder of the allegations contained in said paragraph.

V.

With regard to paragraph VII of Plaintiffs' Complaint, Defendant admits that

Plaintiffs started build a new wall on their property, and Defendant red tagged the project. This Defendant denies the remainder of the allegations contained therein.

VI.

Defendant denies the allegations contained in paragraphs VI, VIII, IX, and X of Plaintiffs' Complaint.

THIRD DEFENSE

Plaintiffs' alleged injuries were caused by an act of God.

FOURTH DEFENSE

Plaintiffs' own negligence was the sole and proximate cause of the Plaintiffs' injuries and damage.

FIFTH DEFENSE

Plaintiffs have failed to take reasonable steps to mitigate the claimed or alleged damages.

SIXTH DEFENSE

The Defendant is immune under Idaho Code § 6-904(7) for the damages arising out of Plaintiffs' cause of action.

SEVENTH DEFENSE

Plaintiffs negligently failed to take proper and adequate protective and preventive measures to prevent or minimize the injuries complained of in this action, and such negligence caused, contributed to, or aggravated said injuries.

EIGHTH DEFENSE

The damages allegedly sustained by Plaintiffs, if any, were caused in whole

or in part by the acts or omissions of persons other than this Defendant and over whom Defendant had no control.

NINTH DEFENSE

The plans, drawings, specifications, and designs for the paved roadways and accompanying drainage were prepared in substantial conformance with engineering and design standards.

TENTH DEFENSE

Prior to construction of the paved streets and accompanying drainage within the Defendant City of Lewiston, the subject plans, drawings, specifications, and designs prepared by this answering Defendant were approved in advance by the City of Lewiston, Public Works Department.

ELEVENTH DEFENSE

Plaintiffs are not the real parties in interest, contrary to Rule 17 of the Idaho Rules of Civil Procedure, with reference to some or all of their claimed damages.

TWELFTH DEFENSE

Plaintiffs' damages, if any, were caused by the superseding and intervening conduct of third persons and/or other entities.

THIRTEENTH DEFENSE

Plaintiffs failed to bring this cause of action within the applicable statute of limitations.

FOURTEENTH DEFENSE

Plaintiffs failed to file an effective and/or timely Notice of Tort Claim with

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regard to some or all of the Plaintiffs' claims of damages.

FIFTEENTH DEFENSE

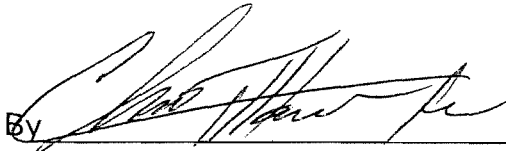
Discovery is just beginning. Therefore, Defendant reserves the right to add any affirmative defenses that arise during the discovery process.

WHEREFORE, Defendant prays that Plaintiffs take nothing by this Complaint, that the Complaint herein be dismissed and that Defendant be awarded their costs of suit, reasonable attorney fees and such other and further relief as the Court deems just.

DEFENDANT DEMANDS A TRIAL BY JURY.

DATED this 14th day of March, 2007.

ANDERSON, JULIAN & HULL LLP

By 

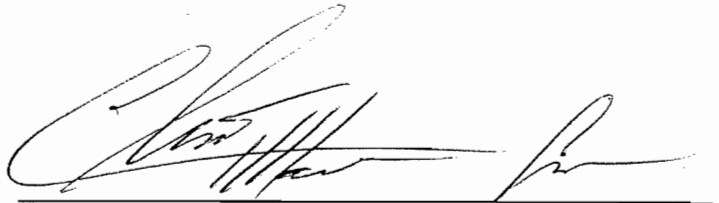
Brian K. Julian, Of the Firm
Attorneys for DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of March, 2007, I served a true and correct copy of the foregoing **ANSWER AND DEMAND FOR JURY TRIAL** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
Telephone: (208) 743-1516
Facsimile: (208) 746-2231

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 746-2231



Brian K. Julian

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Attorneys for Plaintiffs

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY
Patty O. Weeks

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually, and THOMPSON'S AUTO
SALES, INC., an Idaho corporation,
Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision in the State of Idaho,
Defendant.

Case No. CV 07-00200

PROTECTIVE ORDER

WHEREAS, discovery (including interrogatories, document requests and depositions) in the above-entitled action may involve the production or disclosure of trade secrets or sensitive financial or business information; and

WHEREAS, the parties have agreed to orderly discovery of confidential and/or sensitive material; pursuant to Idaho Rule of Civil Procedure 26(c) IT IS HEREBY ORDERED THAT:

1. (a) The provisions of this Order shall apply to (i) the named parties to this action, their agents, attorneys and anyone acting at their discretion; and (ii) any other person producing or disclosing documents or information who, though not a party, agrees in writing to be bound by the terms of this Order. The term "person" includes the named parties and others who have agreed to be bound by this Order. The term "party" includes "TIM K. THOMPSON and JANET M. THOMPSON, husband and wife, individually and doing business as THOMPSON'S AUTO SALES, INC., an Idaho corporation, and the CITY OF LEWISTON, a political subdivision of the State of Idaho, and any of their directors, officers, employees, shareholders, partners, agents or representatives.

(b) The restrictions contained in this Order shall apply to both documents (including all copies, excerpts and summaries thereof) and information. The term "material" shall refer to both documents and information.

2. Any person may designate as "CONFIDENTIAL" any non-public material which it produces during discovery proceedings only when such material contains trade secrets or sensitive commercial, financial or business information, the public disclosure of which may have an adverse effect on the commercial, business or financial position of the person producing it. "CONFIDENTIAL" material shall be identified by stamping such material with the following language: "CONFIDENTIAL" per Order of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce." "CONFIDENTIAL" material shall be subject to the following restrictions:

(a) "CONFIDENTIAL" material shall be used only for purposes of this litigation and not for any business or other purpose whatsoever, and shall not be given, shown, made available

or communicated in any way to anyone except where it is necessary that such material be given or shown for purposes of this litigation, as follows: "CONFIDENTIAL" material produced by the parties or by any non-party witness subpoenaed by the parties in this proceeding shall be made available only to: (i) the law firms of Creason, Moore & Dokken, PLLC, and Anderson, Julian & Hull, LLP, and persons employed by them in para-professional, clerical, stenographic or ministerial positions; (ii) officers, directors, employees and in-house counsel of the parties; (iii) any independent, outside expert or consulting firms retained by the parties for purposes of this proceeding; and (iv) the Court.

(b) All pleadings or other court filings which incorporate or disclose "CONFIDENTIAL" material shall be filed under seal and shall remain under seal until such time as the Court orders otherwise.

(c) Any disclosure of "CONFIDENTIAL" material at trial or in any other court proceeding herein shall be made *in camera* unless the Court orders otherwise.

3. A copy of this Order shall be given to each person who will receive "CONFIDENTIAL" material before being shown such material, and each such person shall be expressly advised that such material shall not be used or further disclosed contrary to the terms of this Order. In addition, each such person who is not employed by a named party shall agree in writing, in the form annexed hereto as Exhibit A, to be bound by the provisions of this Order, before being shown such material.

4. No party concedes that any material designated by any other person as "CONFIDENTIAL" material does in fact contain or reflect trade secrets, proprietary or confidential information, or has been properly designated as "CONFIDENTIAL" material. Any

party may at any time, on reasonable notice, move for (i) modification of this Order, or (ii) relief from the provisions of this Order with respect to specific material, including the use of confidential material as exhibits at depositions.

5. A party shall not be obligated to challenge the propriety of the designation of material as "CONFIDENTIAL" material at the time made, and failure to do so shall not preclude a subsequent challenge. If a party challenges such designation, it shall send or give notice to the designating person and they shall attempt to resolve any challenge in good faith on an expedited and informal basis. If the challenge cannot be expeditiously and informally resolved, the challenging party may, on reasonable notice, apply for appropriate rulings from the Court. The confidential material in issue shall continue to be treated as designated until the Court orders otherwise.

6. This Order, insofar as it restricts the communication and use of confidential material, shall continue to be binding throughout and after the conclusion of this action, including any appeals. At the conclusion of this action all documents, material or other information designated as "CONFIDENTIAL" all copies and all documents so labeled shall be promptly returned by the receiving party to the producing person. To the extent that documents reflecting attorney work-product contain information designated "CONFIDENTIAL" the receiving party may, in lieu of returning such documents to the producing person, certify in writing to the producing person that such documents have been destroyed. All briefs, pleadings, or other filings with the Court which incorporate or disclose confidential material may remain in the possession of the parties' counsel and need not be destroyed, but shall remain subject to the terms and conditions of this Order.

7. The production or disclosure pursuant to the terms of this Order of some material deemed confidential by a person shall not waive or prejudice the right of that person to object to the production or disclosure of other documents or information in this action or any other action.

8. Nothing in this Order shall:

(a) Prevent or restrict any party from using or disclosing any material which was previously submitted to it;

(b) Prevent or restrict counsel from rendering legal advice to the named parties and, in the course thereof, referring or relying generally on counsel's examination of material produced in the course of discovery proceedings herein, but without disclosing the specific content of any material which disclosure shall be contrary to the terms of this Order; or

(c) Prevent or restrict any person from using or disclosing in any way any material it has produced or disclosed in the course of discovery proceedings.

DATED this 17th day of June, 2007.


DISTRICT JUDGE

Presented By:

Theodore O. Creason, # 1563
Attorneys for Plaintiffs

Brian K. Julian, ISB # 2360
Attorneys for Defendant

EXHIBIT A

**To Protective Order Entered
on _____, 2007**

I have read the Protective Order entered by the Court on _____, 2007, in *Tim K. Thompson and Janet M. Thompson, husband and wife, individually and doing business as Thompson's Auto Sales, Inc., an Idaho corporation, Plaintiffs, vs. City of Lewiston, a political subdivision of the State of Idaho, Defendants, Nez Perce County Case No. CV07-00200*. I understand the provisions of such Protective Order and I understand the responsibilities and obligations such Protective Order imposes on persons viewing the material encompassed by the Protective Order. Pursuant to Paragraph 5 of the Protective Order, so as to enable me to view the material encompassed by the Order, I hereby agree to be bound by all the provisions of the Protective Order.

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2007.

Notary Public in and for said state
residing at or employed in _____
My Commission Expires _____

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th of June 2007, a copy of the foregoing PROTECTIVE ORDER served by the method indicated below and addressed to the following:

Theodore O. Creason
Creason, Moore & Dokken, PLLC
1219 Idaho Street
P. O. Drawer 835
Lewiston, ID 83501

Brian K. Julian
Anderson, Julian & Hull, LLP
250 South Fifth Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426

 X FIRST-CLASS MAIL
 HAND DELIVERED
 OVERNIGHT MAIL
 FAX TRANSMISSION

PATTY O. WEEKS, CLERK

By *[Signature]*
Deputy



Brian K. Julian – ISB No. 2360
Amy G. White – ISB No. 5019
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: bjulian@ajhlaw.com
awhite@ajhlaw.com

FILED

2007 DEC 28 AM 9 23

ORIGINAL
CLERK OF DISTRICT COURT
W. S. Hammond
DEPUTY

Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife, individually
and doing business as THOMPSON'S
AUTO SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political subdivision
of the State of Idaho,

Defendant.

Case No. CV07-00200

AFFIDAVIT OF JOHN WATSON IN
SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

STATE OF IDAHO)
) ss:
County of _____)

JOHN WATSON, having been first duly sworn upon oath, deposes and says:

1. That the statements contained herein are made of your Affiant's own personal
knowledge and are true and correct to the best of his information.

2. I am a licensed engineer in the state of Idaho, and have been since January
2000. From approximately January 2001 through May 2004, I worked as an assistant

AFFIDAVIT OF JOHN WATSON IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT - 1

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engineer for the City of Lewiston. Since approximately May 2004 I have worked as an engineer at Riedesel Engineering in Lewiston, Idaho.

3. As part of my duties as an assistant engineer at the City of Lewiston, I was involved in the 2003 Street Maintenance Project. A majority of this project consisted of repaving and chip sealing the asphalt on city streets. In May of 2003 I prepared the plans necessary to complete the Street Maintenance Project, a true and correct copy of which are attached hereto as Exhibit "A".

4. As part of the Street Maintenance Project, I designed a plan for removing a three foot wide valley gutter which crossed Idaho Street at the intersections of Idaho Street and 21st Street in Lewiston, Idaho. The valley gutter was being replaced, among other reasons, because it was causing traffic problems. Cars had to slow down as they turned onto Idaho Street to avoid striking the pavement due to the extreme dip of the valley gutter.

5. The plans required that the valley gutter be replaced with a catch basin and bubble-up system. Page 7 of the plans attached as Exhibit A accurately portrays the installation of the bubble-up system at the intersection of Idaho and 21st Streets (page 9 of the plans mistakenly shows that the bubble-up system was to be installed at the intersection of G and 21st Streets).

6. In May, bid packets were sent out to contractors regarding the Street Maintenance Project. The plans attached as Exhibit A were included, among other documents, in the bid packets. I reviewed the bid proposals from the contractors, and prepared a memorandum to the Lewiston City Purchasing Division outlining the tasks to be accomplished as well as the bids from three separate companies. Accompanying

the memorandum is a bid tabulation table, breaking down the costs of the various components of the Street Maintenance Project. Attached hereto as Exhibit "B" is a true and correct copy of this memorandum and accompanying bid tabulations.

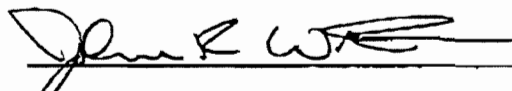
7. The bid tabulation includes item numbers and item descriptions for the work that the contractors were required to complete. Item No. 603-1 is described as a catch basin, of which two were to be purchased and installed. Item No. 605-1 is described as a twelve inch PVC storm sewer pipe. These item numbers correspond with the detail for installation of the catch basin/bubble up system under Idaho Street on page 9 of the Street Maintenance Project plans, attached as Exhibit A.

8. After preparing this memorandum, I sent it to Dale Bloom, a purchasing agent for the City of Lewiston.

9. On June 12, 2003, the City sent a notice to Poe Asphalt & Paving that they had been awarded the contract on the Street Maintenance Project. Attached hereto as Exhibit "C" is a true and correct copy of the letter awarding the contract to Poe Construction.

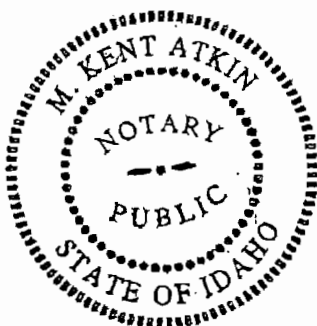
10. On June 26, 2003, the City sent a notice to Poe Asphalt & Paving that they were to proceed on the Street Maintenance Project. Attached hereto as Exhibit "D" is a true and correct copy of the notice to proceed which was sent to Poe Asphalt and Paving.

FURTHER your Affiant saith naught.



John Watson

SUBSCRIBED AND SWORN to before me this 20 day of December, 2007.



A handwritten signature in black ink, appearing to read "M. Kent Atkin", written over a horizontal line.

Notary Public for Idaho

Residing at: Nez Perce County

My Commission Expires: 6/17/2010

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of December, 2007, I served a true and correct copy of the foregoing **AFFIDAVIT OF JOHN WATSON IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
Telephone: (208) 743-1516
Facsimile: (208) 746-2231

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 746-2231


Brian K. Julian

CONTRACT PLANS

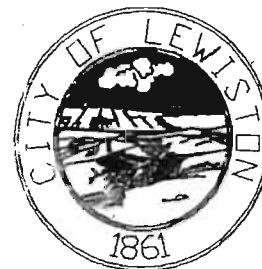
2003 STREET MAINTENANCE PROJECT

STREET CHIP SEAL
COUNTRY CLUB DRIVE OVERLAY
21ST STREET PAVEMENT REHABILITATION

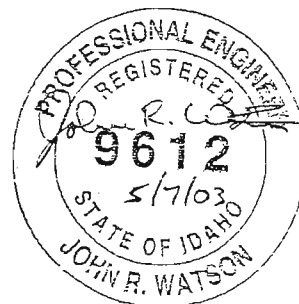
CITY OF LEWISTON, IDAHO
MAY, 2003

THE LOCATION OF EXISTING UTILITIES ON THESE PLANS ARE APPROXIMATE AND SHOWN FOR INFORMATION ONLY. THE CONTRACTOR SHALL PERFORM A SEPARATE INVESTIGATION IN THE FIELD TO DETERMINE THE EXACT LOCATION OF ALL EXISTING UNDERGROUND UTILITIES. INFORMATION REGARDING THE LOCATION OF EXISTING UNDERGROUND UTILITIES CAN BE OBTAINED FROM:

"DIGLINE"
1-800-342-1585



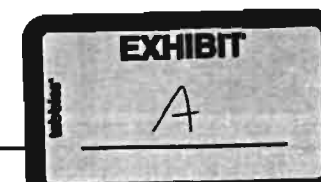
SPONSORED BY:
CITY OF LEWISTON
PUBLIC WORKS DEPARTMENT



SHEET INDEX

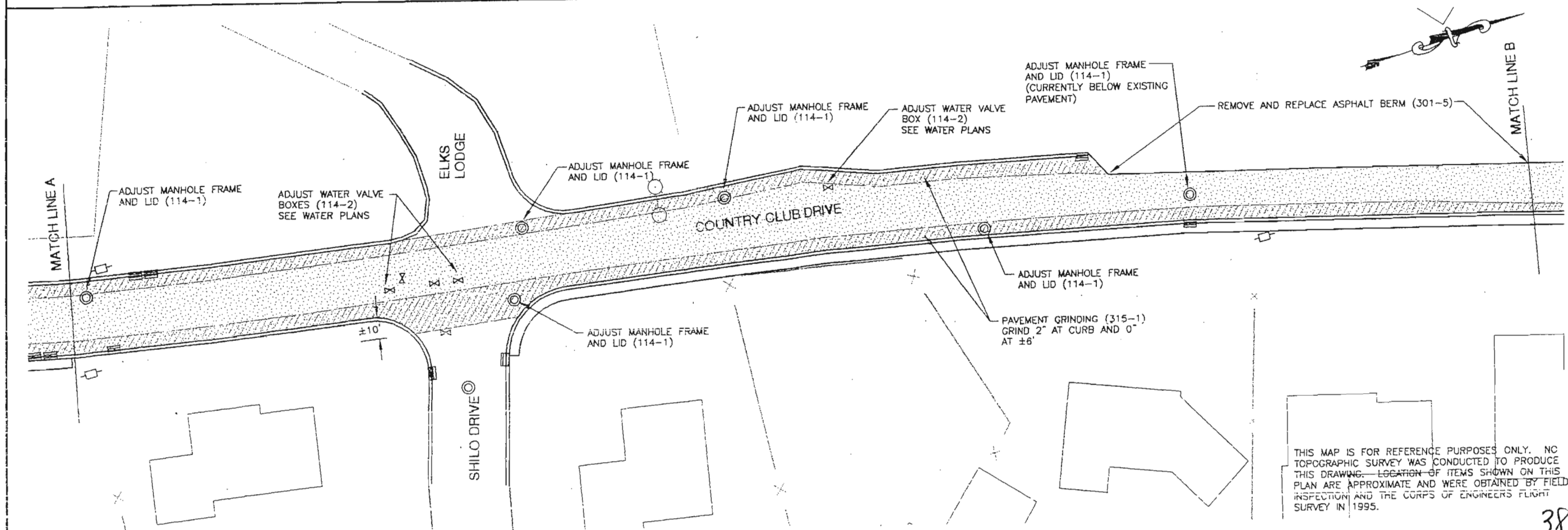
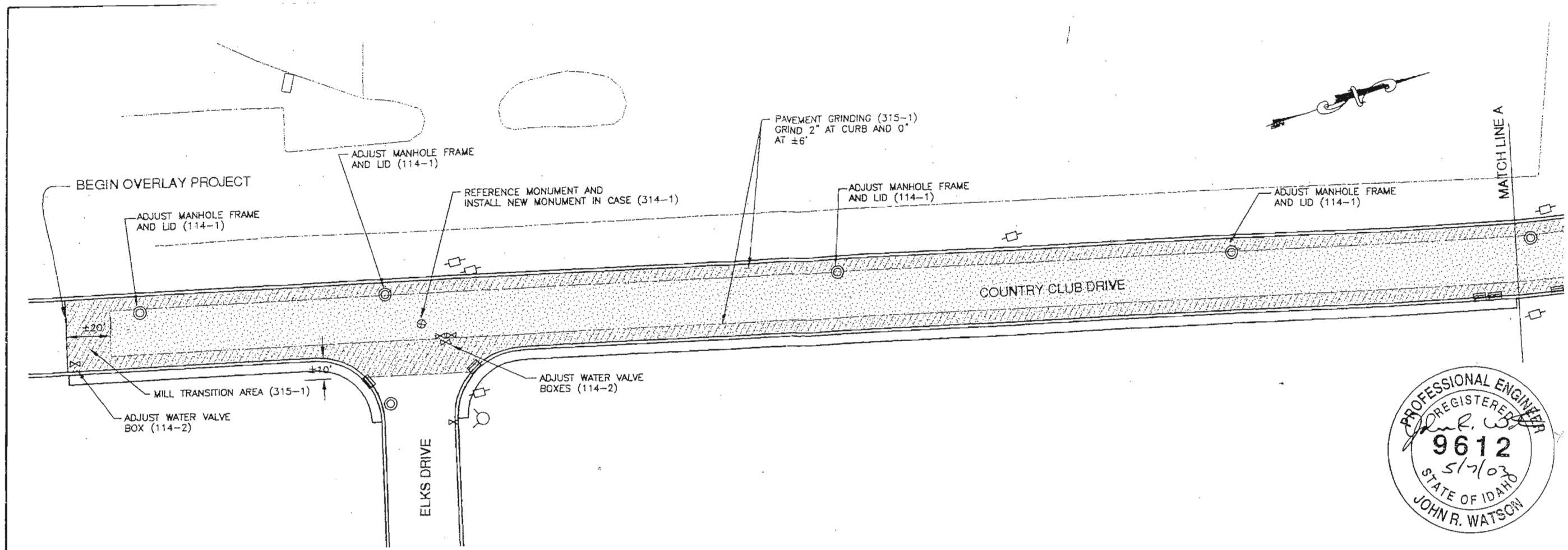
- | | |
|------|-------------------------------------|
| 1 | TITLE SHEET |
| 2-5 | COUNTRY CLUB DRIVE OVERLAY |
| 6-11 | 21ST STREET PAVEMENT REHABILITATION |

SEE FULL SIZE SHEET INSERT IN THE CONTRACT DOCUMENTS FOR CHIP SEAL AREAS




Set #13

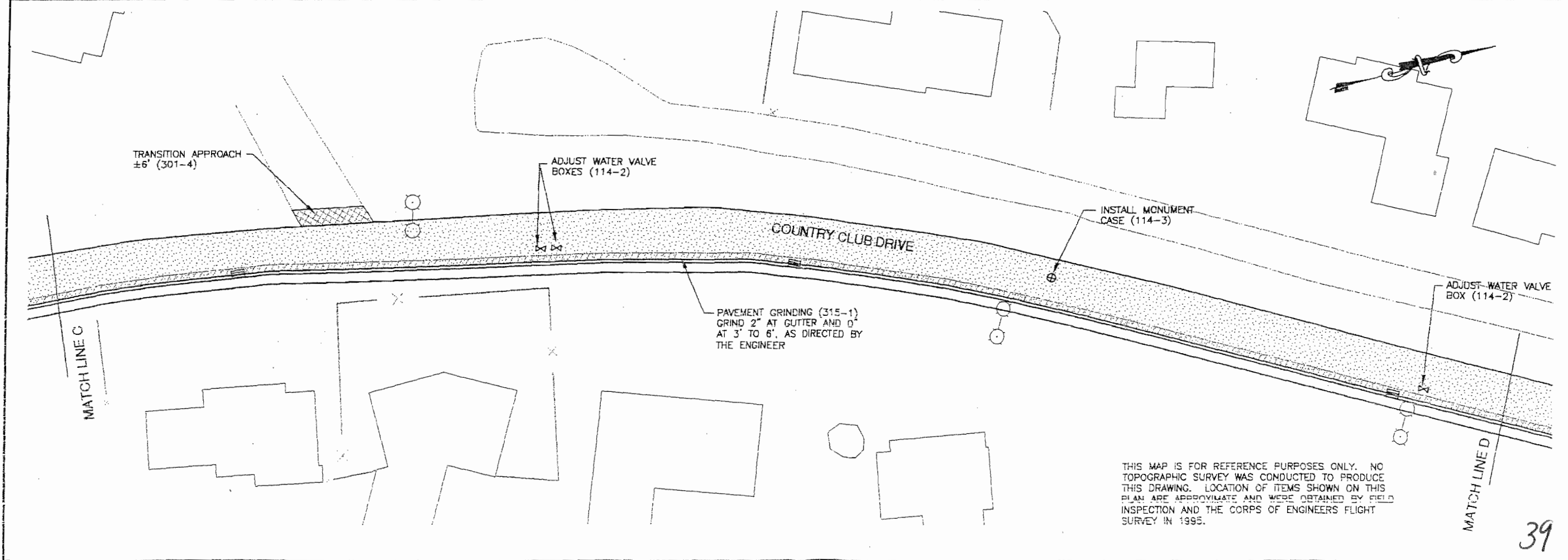
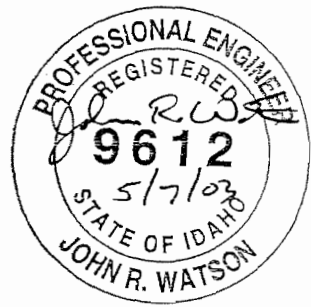
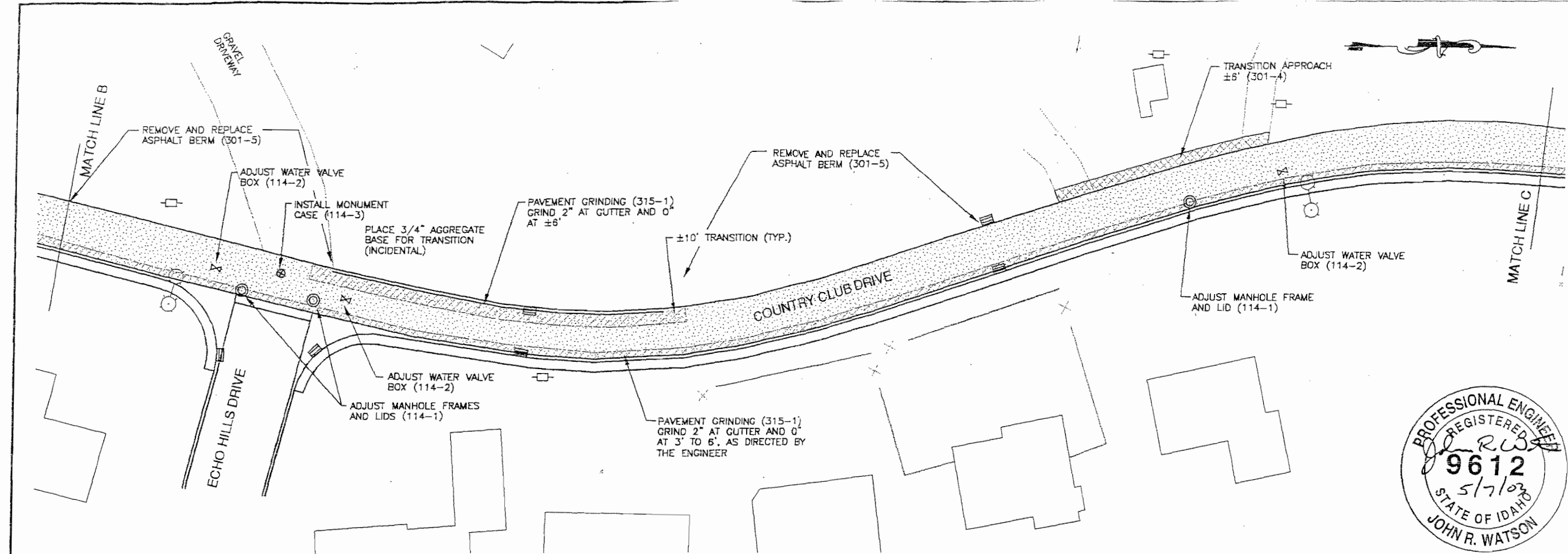
37



THIS MAP IS FOR REFERENCE PURPOSES ONLY. NO TOPOGRAPHIC SURVEY WAS CONDUCTED TO PRODUCE THIS DRAWING. LOCATION OF ITEMS SHOWN ON THIS PLAN ARE APPROXIMATE AND WERE OBTAINED BY FIELD INSPECTION AND THE CORPS OF ENGINEERS FLIGHT SURVEY IN 1995.

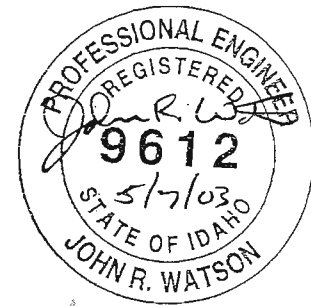
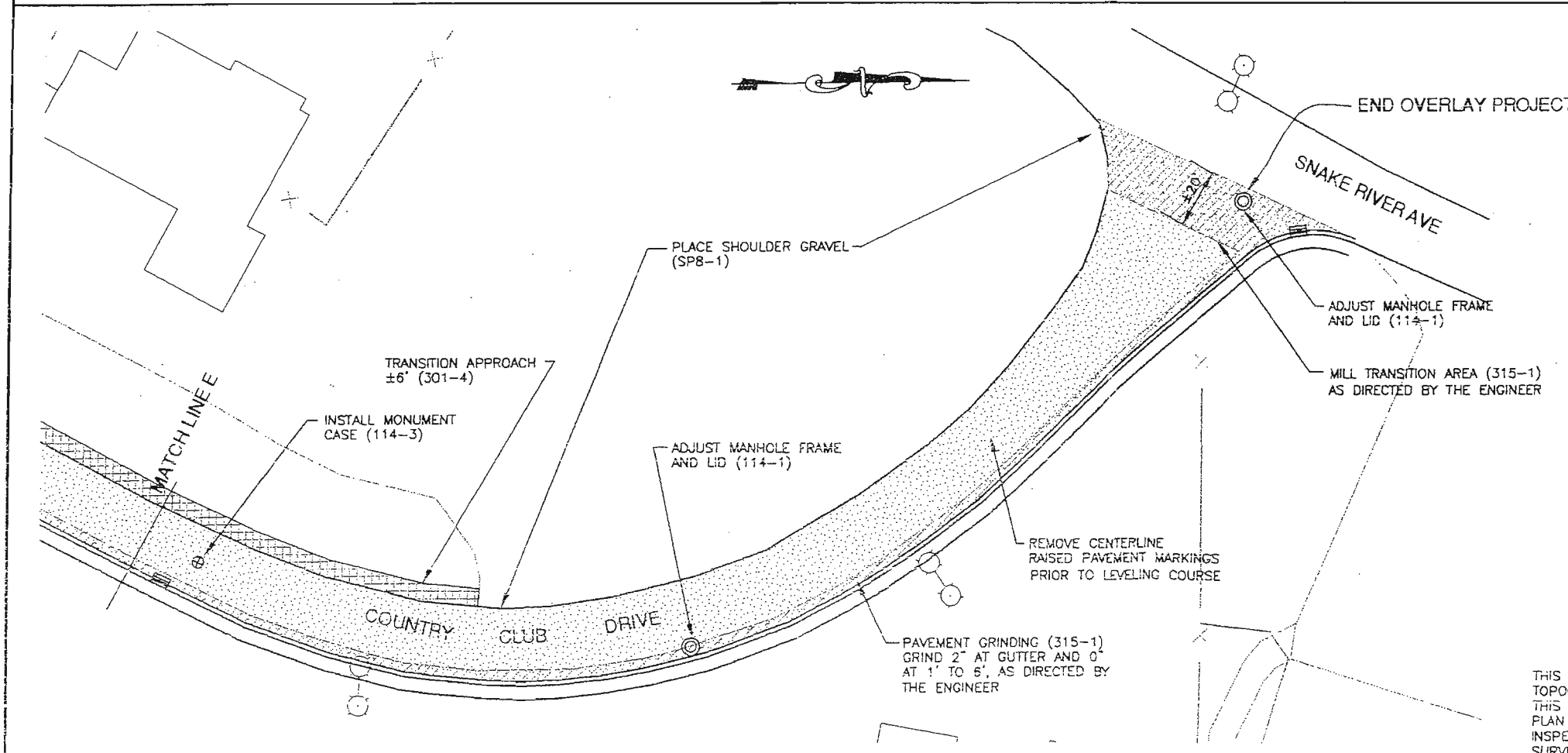
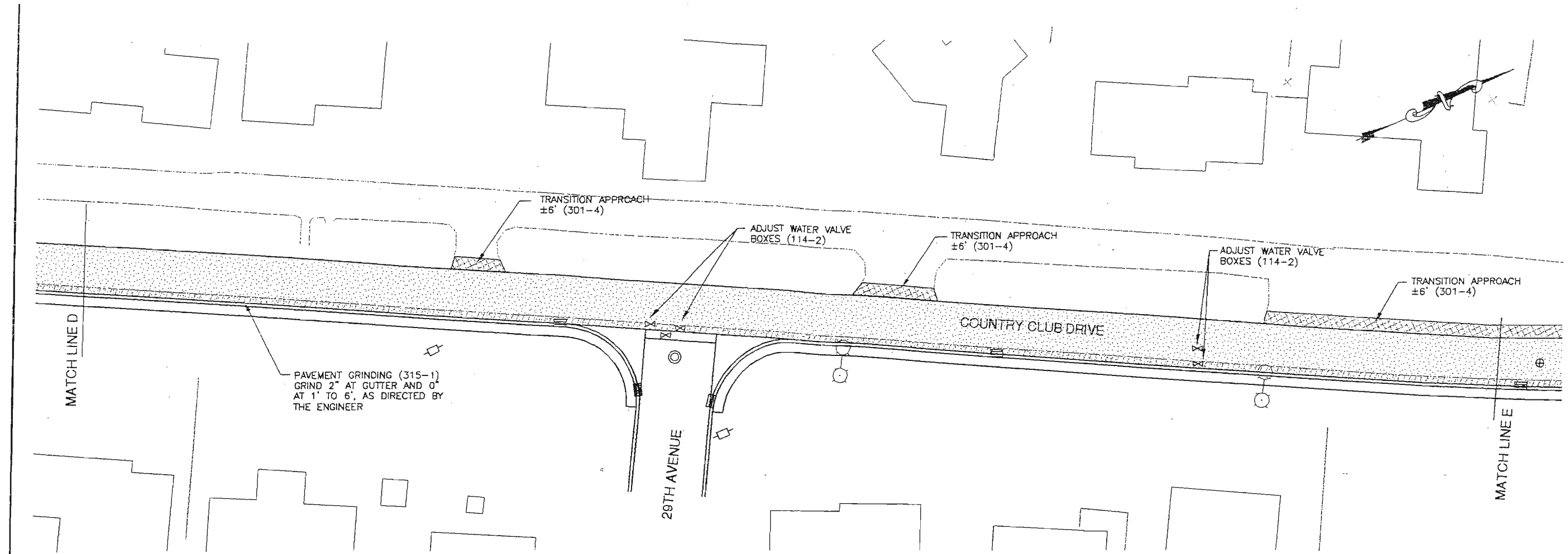
CITY OF LEWISTON PUBLIC WORKS DEPARTMENT ENGINEERING SERVICES 1134 "I" STREET, LEWISTON, ID 83501 208-740-1316 FAX 208-746-9667				2003 STREET MAINTENANCE PROJECT COUNTRY CLUB DRIVE OVERLAY		SCALE: 1"=50' DATE: 3/12/03 DRAWING NO: Country Club SHEET 2 of 11
DESIGNED BY	DRWN BY	CHECKED BY	BY	NO.	DATE	DESCRIPTION
JRW	JRW	LJC				

\\cityoflewiston\projects\2003\20030111\20030111.dwg, 10/17/03 09:33:33 AM



THIS MAP IS FOR REFERENCE PURPOSES ONLY. NO TOPOGRAPHIC SURVEY WAS CONDUCTED TO PRODUCE THIS DRAWING. LOCATION OF ITEMS SHOWN ON THIS PLAN ARE APPROXIMATE AND WERE OBTAINED BY FIELD INSPECTION AND THE CORPS OF ENGINEERS FLIGHT SURVEY IN 1995.

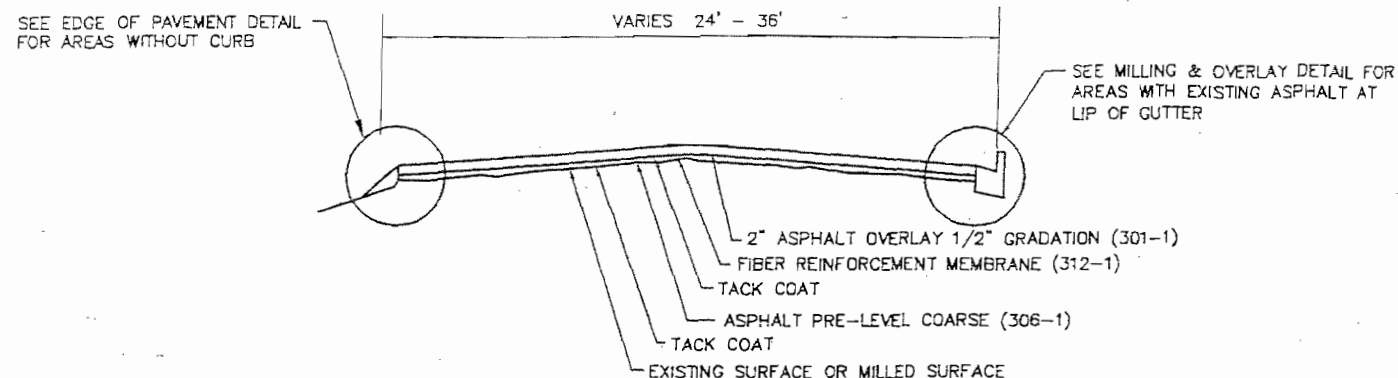
CITY OF LEWISTON PUBLIC WORKS DEPARTMENT ENGINEERING SERVICES 1134 "F" STREET, LEWISTON, ID 83501 208-746-1316 -- FAX 208-746-9887				2003 STREET MAINTENANCE PROJECT COUNTRY CLUB DRIVE OVERLAY		REVISIONS		DESIGNED BY: JRW DRAWN BY: JRW CHECKED BY: LUC DATE: 3/12/03 BY: JRW DATE: 5/7/03	SCALE: 1" = 50' DATE: 3/12/03 DRAWING NO: Country Club SHEET 3 OF 11
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THIS MAP IS FOR REFERENCE PURPOSES ONLY. NO TOPOGRAPHIC SURVEY WAS CONDUCTED TO PRODUCE THIS DRAWING. LOCATION OF ITEMS SHOWN ON THIS PLAN ARE APPROXIMATE AND WERE OBTAINED BY FIELD INSPECTION AND THE CORPS OF ENGINEERS FLIGHT SURVEY IN 1995.

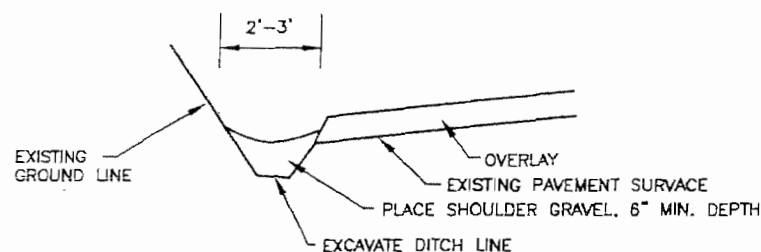
CL 569 40

CITY OF LEWISTON PUBLIC WORKS DEPARTMENT ENGINEERING SERVICES 1134 "F" STREET, LEWISTON, ID 83501 208-746-1316 --- FAX 208-746-9887		2003 STREET MAINTENANCE PROJECT COUNTRY CLUB DRIVE OVERLAY		NO. _____ DATE _____ DESCRIPTION _____ BY _____	DESIGNED BY: JRW DRAWN BY: JRW CHECKED BY: LJC JRW M.T.	SCALE: 1" = 50' DATE: 3/12/03 DRAWING NO.: Country Club SHEET 4 OF 11



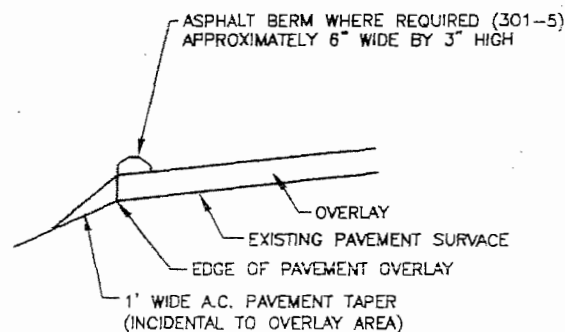
COUNTRY CLUB DRIVE OVERLAY
TYPICAL SECTION

N.T.S.



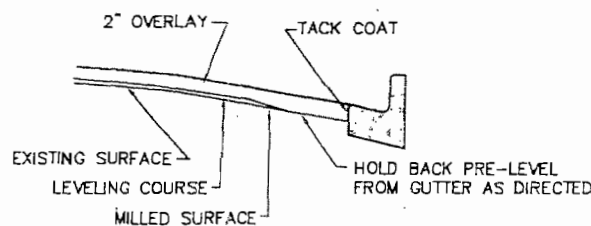
SHOULDER GRAVEL DETAIL (SP8)

N.T.S.



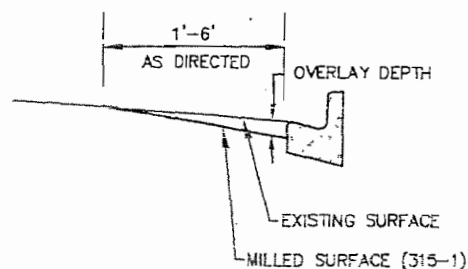
EDGE OF PAVEMENT DETAIL

N.T.S.



OVERLAY DETAIL

N.T.S.



MILLING DETAIL

N.T.S.

COUNTRY CLUB DRIVE OVERLAY TRAFFIC CONTROL NOTES:

ALL TRAFFIC CONTROL SHALL BE IN COMPLIANCE WITH SECTION 113, TRAFFIC CONTROL, IN THE STANDARD TECHNICAL SPECIFICATIONS. THE TRAFFIC CONTROL PLAN FOR COUNTRY CLUB DRIVE SHALL BE AT A MINIMUM IN ACCORDANCE WITH ITD STANDARD DRAWING 1-1-A, TRAFFIC CONTROL MEASURES FOR LANE CLOSURE. THE PERIMETER OF THE CONSTRUCTION SHALL BE PROPERLY SIGNED WITH "ROAD WORK AHEAD" SIGNS. THE CONTRACTOR SHALL PREPARE A TRAFFIC CONTROL PLAN PRIOR TO ANY WORK AND SHALL SUBMIT THE PLAN FOR REVIEW, EDITING AND APPROVAL A MINIMUM OF 10 DAYS PRIOR TO THE START OF WORK.

COUNTRY CLUB DRIVE OVERLAY NOTES:

ALL ASPHALT SURFACES AND ADJACENT PAVEMENT OR CURB EDGES WHICH RECEIVE A PRE-LEVEL OR OVERLAY COURSE SHALL BE TACKED PRIOR TO PLACEMENT.

COMPLETE THE REQUIRED QUALITY PATCHING PRIOR TO CONSTRUCTION OF THE LEVELING COURSE.

THE FIBER REINFORCING MEMBRANE SHALL BE HELD OUT TWO FEET FROM THE LIP OF GUTTER OR EXISTING PAVEMENT EDGE.

THE GROUND PAVEMENT MATERIAL SHALL BE TRANSPORTED TO A DESIGNATED AREA IN THE PARKING LOT BEHIND THE BALL-FIELDS AT AIRPORT PARK AND STOCKPILED, AS DIRECTED BY THE ENGINEER.

LAYOUT AND SURVEYING OF THE CONSTRUCTION ITEMS IS THE RESPONSIBILITY OF THE CONTRACTOR. PLACEMENT OF LEVELING COURSE TO A DESIGNATED CENTERLINE GRADE SHALL BE COMPLETED BY THE CONTRACTOR USING GRADES SUPPLIED BY THE CITY. GRADES WILL BE GIVEN TO THE CONTRACTOR PRIOR TO MILLING AND PAVING OPERATIONS.

THE CONTRACTOR IS RESPONSIBLE FOR LOCATING ALL UNDERGROUND UTILITIES PRIOR TO EXCAVATION.

THE CONTRACTOR SHALL COMPLETE THE WORK ON COUNTRY CLUB DRIVE WITHIN TEN (10) CONSECUTIVE WORKING DAYS FROM COMMENCEMENT OF WORK ON THE STREET.

LONGITUDINAL PAVING JOINT SHALL BE AT THE CENTERLINE OF THE ROAD.

THE CONTRACTOR SHALL PLACE TEMPORARY MARKING TAPE ALONG THE CENTERLINE PRIOR TO OPENING THE STREET UP TO TRAFFIC.

THE CROSS SLOPE OF COUNTRY CLUB DRIVE WILL BE INCREASED IN SOME AREAS WITH THE LEVELING COURSE. THE CITY WILL MARK THE FINISHED CENTERLINE GRADE ELEVATION OF THE LEVELING COURSE AT INTERVALS PRIOR TO CONSTRUCTION.

THE WATERLINE REPLACEMENT PROJECT BETWEEN THE SOUTH END OF THE PROJECT AND ECHO HILLS DRIVE SHALL BE COMPLETED PRIOR TO THE QUALITY PATCH AND OVERLAY PORTIONS OF THE STREET RECONSTRUCTION.



2003 STREET MAINTENANCE
PROJECT

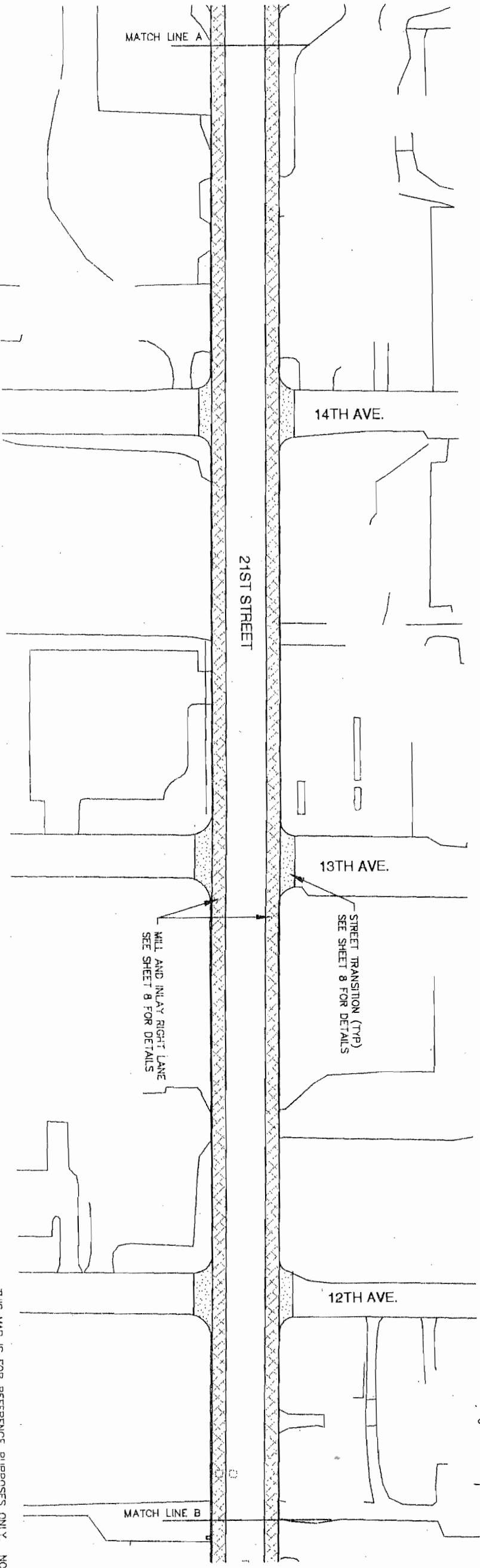
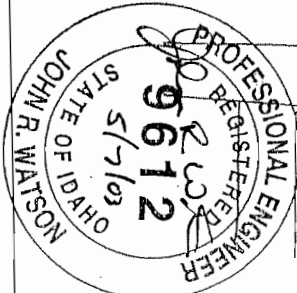
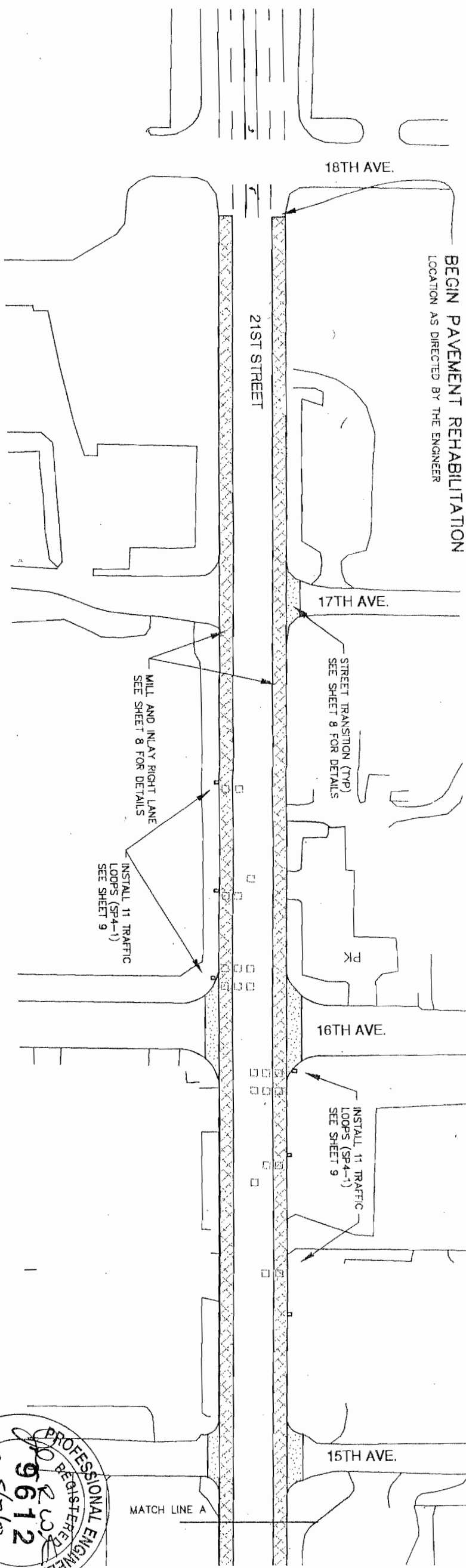
COUNTRY CLUB DRIVE OVERLAY



CITY OF LEWISTON
PUBLIC WORKS DEPARTMENT
ENGINEERING SERVICES
1134 "F" STREET, LEWISTON, ID 83501
208-746-1318 -- FAX 208-746-8887

DESIGNED BY:	JRW	SCALE:	1" = 50'
DRAWN BY:	JRW	DATE:	3/12/03
CHECKED BY:	LJC	DRAWING NO.:	Country Club
BY:		SHEET	5 OF 11

BEGIN PAVEMENT REHABILITATION
LOCATION AS DIRECTED BY THE ENGINEER



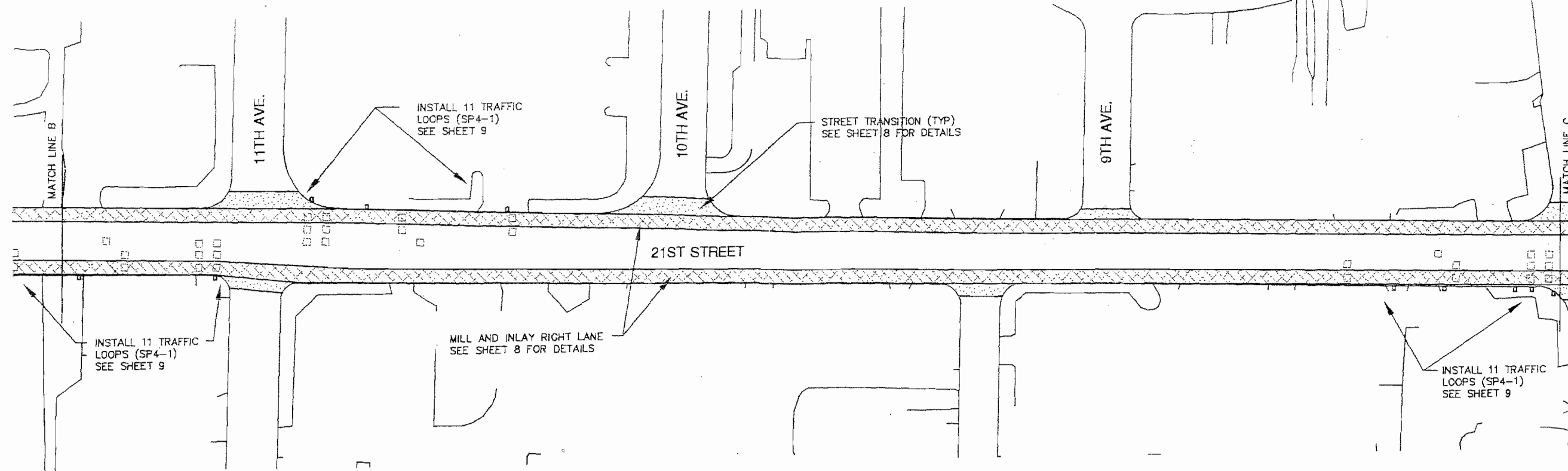
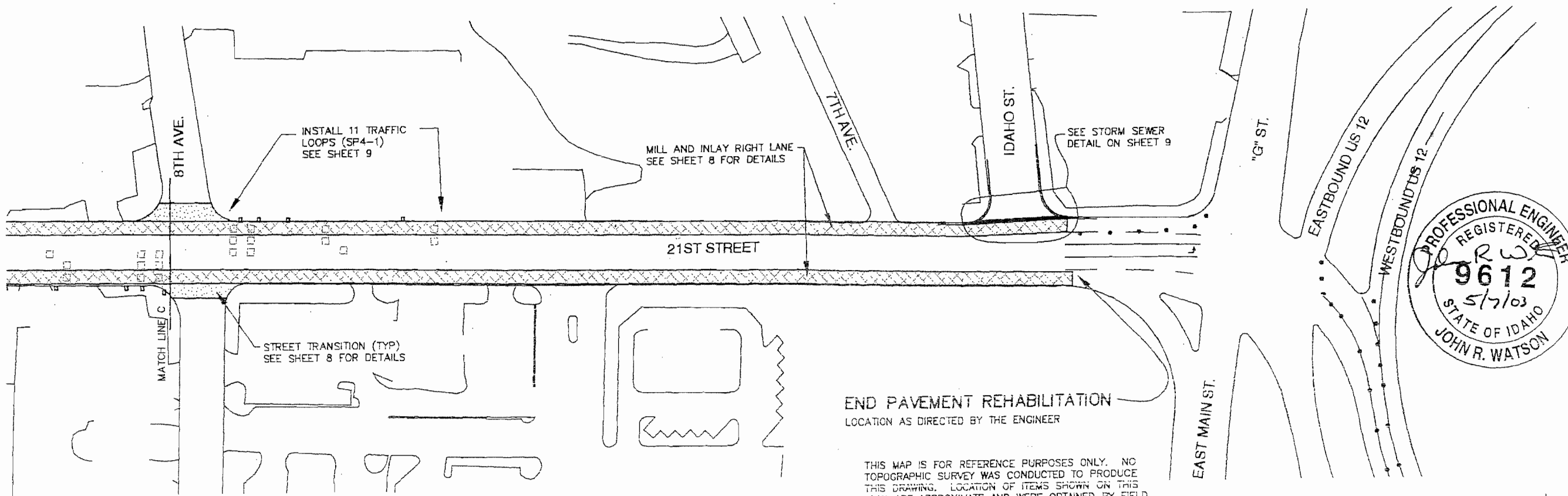
THIS MAP IS FOR REFERENCE PURPOSES ONLY. NO TOPOGRAPHIC SURVEY WAS CONDUCTED TO PRODUCE THIS DRAWING. LOCATION OF ITEMS SHOWN ON THIS PLAN ARE APPROXIMATE AND WERE OBTAINED BY FIELD INSPECTION AND THE CORPS OF ENGINEERS FLIGHT SURVEY IN 1995.

CITY OF LEWISTON
PUBLIC WORKS DEPARTMENT
ENGINEERING SERVICES
1134 "F" STREET, LEWISTON, ID 83501
208-748-1316 -- FAX 208-748-9887



2003 STREET MAINTENANCE PROJECT
21ST STREET PAVEMENT REHABILITATION

REVISIONS				DESIGNED BY:	JRW	SCALE:	1" = 100'
				DRAWN BY:	JRW	DATE:	4/03
				CHECKED BY:	LJC	DRAWING NO.:	21st Street
						SHEET	6 OF 11
NO.	DATE	DESCRIPTION	BY	X32 NO.			



2003 STREET MAINTENANCE
PROJECT



CITY OF LEWISTON
PUBLIC WORKS DEPARTMENT
ENGINEERING SERVICES
1134 "C" STREET, LEWISTON, ID 83501
208-748-1316 -- FAX 208-748-9987

[illegible]

DESIGNED BY	JRW
DRAWN BY	JRW
CHECKED BY	LJC

SCALE: 1" = 100'

DATE: 4/03

DRAWING NO: 21st Street

CL 572

43

21ST STREET PAVEMENT REHABILITATION NOTES:

SEE ADDITIONAL CONTRACTOR NOTES IN THE SPECIAL PROVISIONS.

ALL ADJACENT PAVEMENT OR CURB EDGES WHICH RECEIVE A PRE-LEVEL OR OVERLAY COURSE SHALL BE TACKED PRIOR TO PLACEMENT.

THE GROUND PAVEMENT MATERIAL SHALL BE TRANSPORTED TO A DESIGNATED AREA AT THE POLICE TRAINING CENTER ON 16TH AVENUE AND/OR THE AREA WEST OF U.S. 12, BETWEEN MEMORIAL BRIDGE AND THIRD AVENUE NORTH, AS DIRECTED BY THE ENGINEER.

PLACE TEMPORARY STRIPING TAPE AT THE LANE LINE AS NEEDED.

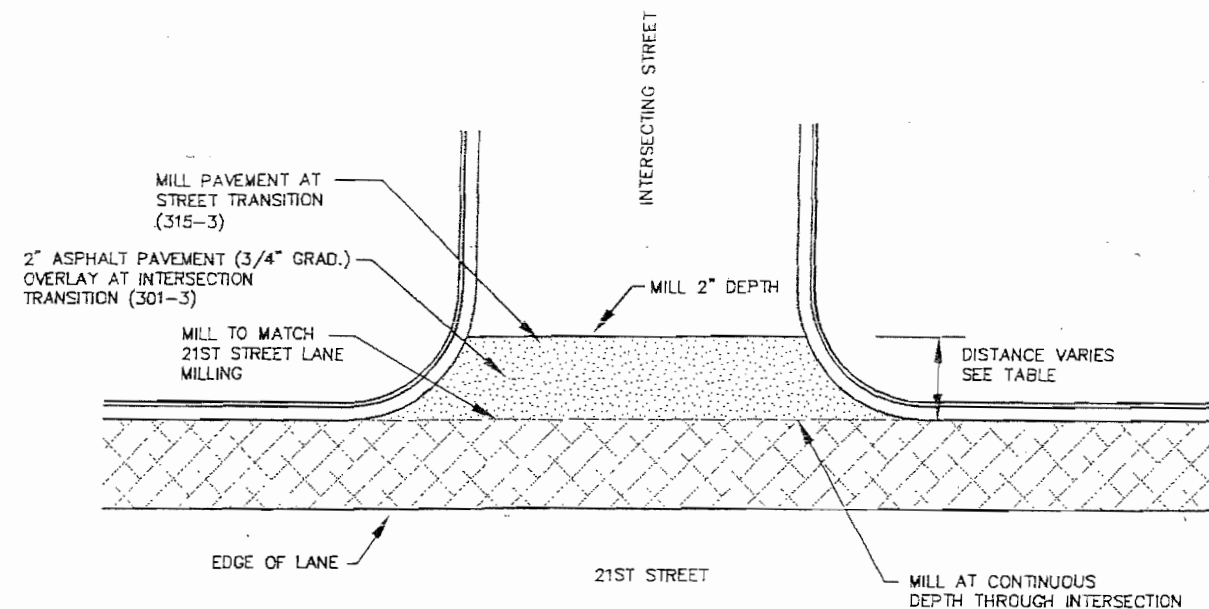
THE CONTRACTOR IS RESPONSIBLE FOR LOCATING ALL UNDERGROUND UTILITIES PRIOR TO EXCAVATION.

THE FINAL LIFT OF ASPHALT PAVEMENT ON ONE SIDE OF THE STREET SHALL BE COMPLETE PRIOR TO WORK BEGINNING ON THE OTHER SIDE.

AT INTERSECTING STREETS AND DRIVEWAY ACCESS POINTS, THE CONTRACTOR SHALL TRANSITION THE MILLING DROP OFF WITH PLACEMENT OF PAVEMENT GRINDINGS. GRINDING MATERIAL SHALL BE REMOVED PRIOR TO THE LEVELING COURSE AND OVERLAY.

A MINIMUM OF ONE DRIVEWAY ACCESS SHALL BE USABLE BY THE PROPERTY OWNER AT ALL TIMES, UNLESS PREVIOUS ARRANGEMENTS ARE MADE. THE CONTRACTOR SHALL COORDINATE THE ACCESS POINTS WITH THE PROPERTY OWNER.

ASPHALT FOR QUALITY PATCH WORK ON 21ST STREET SHALL BE REMOVED AND REPLACED DURING THE SAME NIGHT WORK SHIFT.

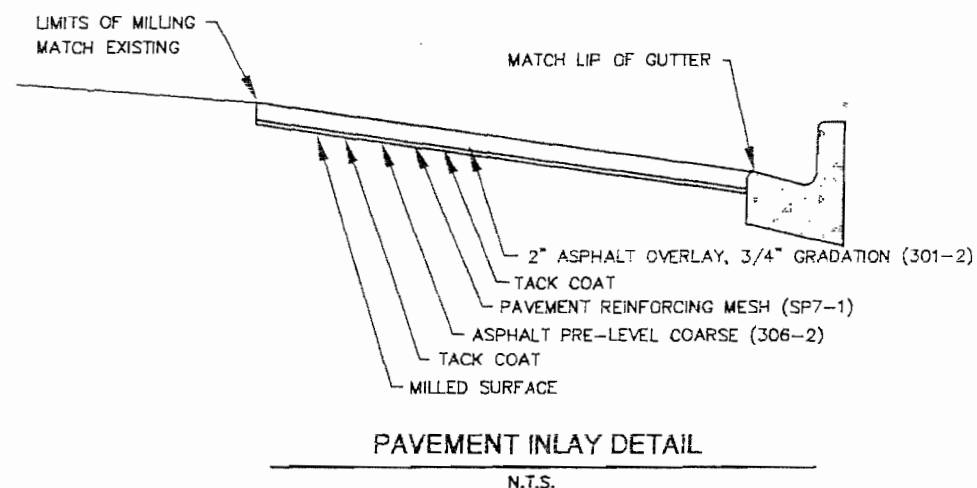


STREET TRANSITION DETAIL

N.T.S.

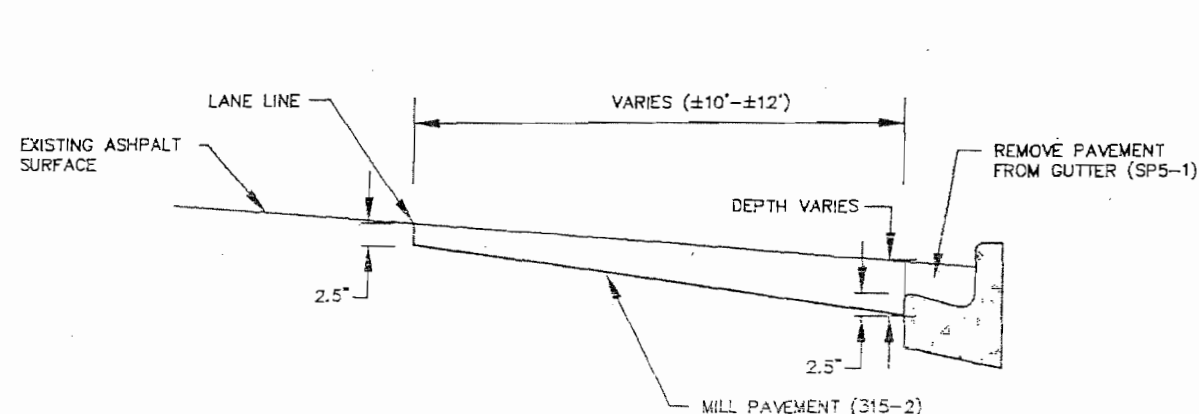
INTERSECTING STREET TRANSITION DISTANCES

INTERSECTING STREET	APPROXIMATE DISTANCE (FT)	
	EAST APPROACH	WEST APPROACH
17TH AVENUE	N/A	12'
16TH AVENUE	12'	13'
15TH AVENUE	10'	14'
14TH AVENUE	11'	13'
13TH AVENUE	15'	13'
12TH AVENUE	16'	12'
11TH AVENUE	12'	15'
10TH AVENUE	N/A	15'
9TH AVENUE	11'	9'
8TH AVENUE	13'	16'



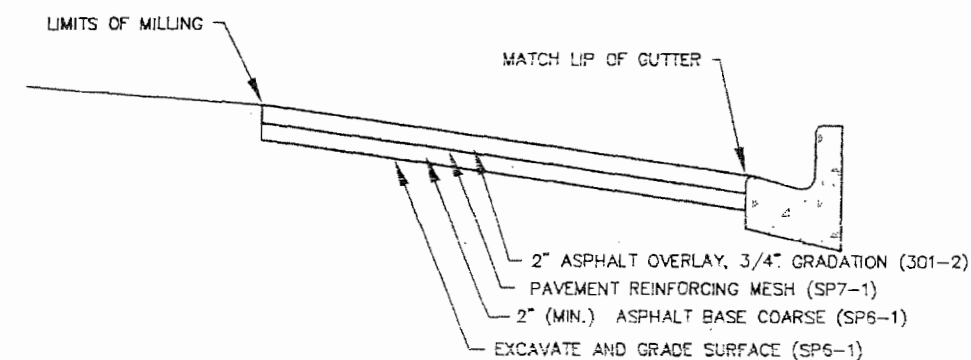
PAVEMENT INLAY DETAIL

N.T.S.



MILLING DETAIL

N.T.S.



* PAVEMENT REPAIR DETAIL (SP6)

N.T.S.

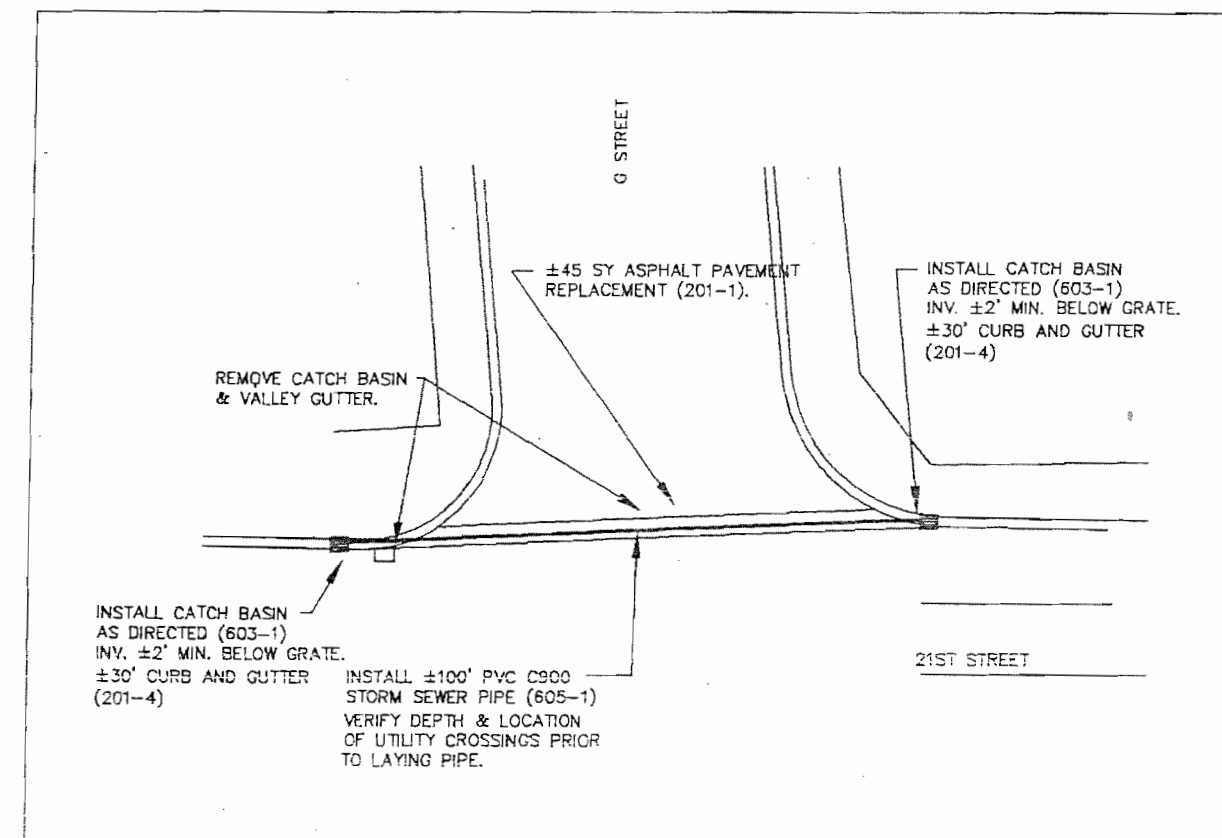
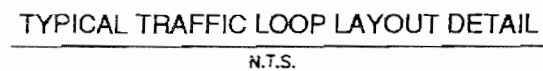
* NOTE: THIS SECTION SHALL BE USED IN AREAS WHICH, AFTER MILLING, ARE FOUND TO HAVE INSUFFICIENT EXISTING ASPHALT PAVEMENT MATERIAL TO COMPLETE THE INLAY, AS DIRECTED BY THE ENGINEER. ASPHALT CORE DEPTH INFORMATION IS AVAILABLE FROM THE ENGINEER UPON REQUEST.

2003 STREET MAINTENANCE PROJECT

21ST STREET PAVEMENT REHABILITATION



CITY OF LEWISTON
PUBLIC WORKS DEPARTMENT
ENGINEERING SERVICES
1134 "F" STREET, LEWISTON, ID 83501
209-746-1116 -- FAX 209-746-9667



STORM SEWER DETAIL

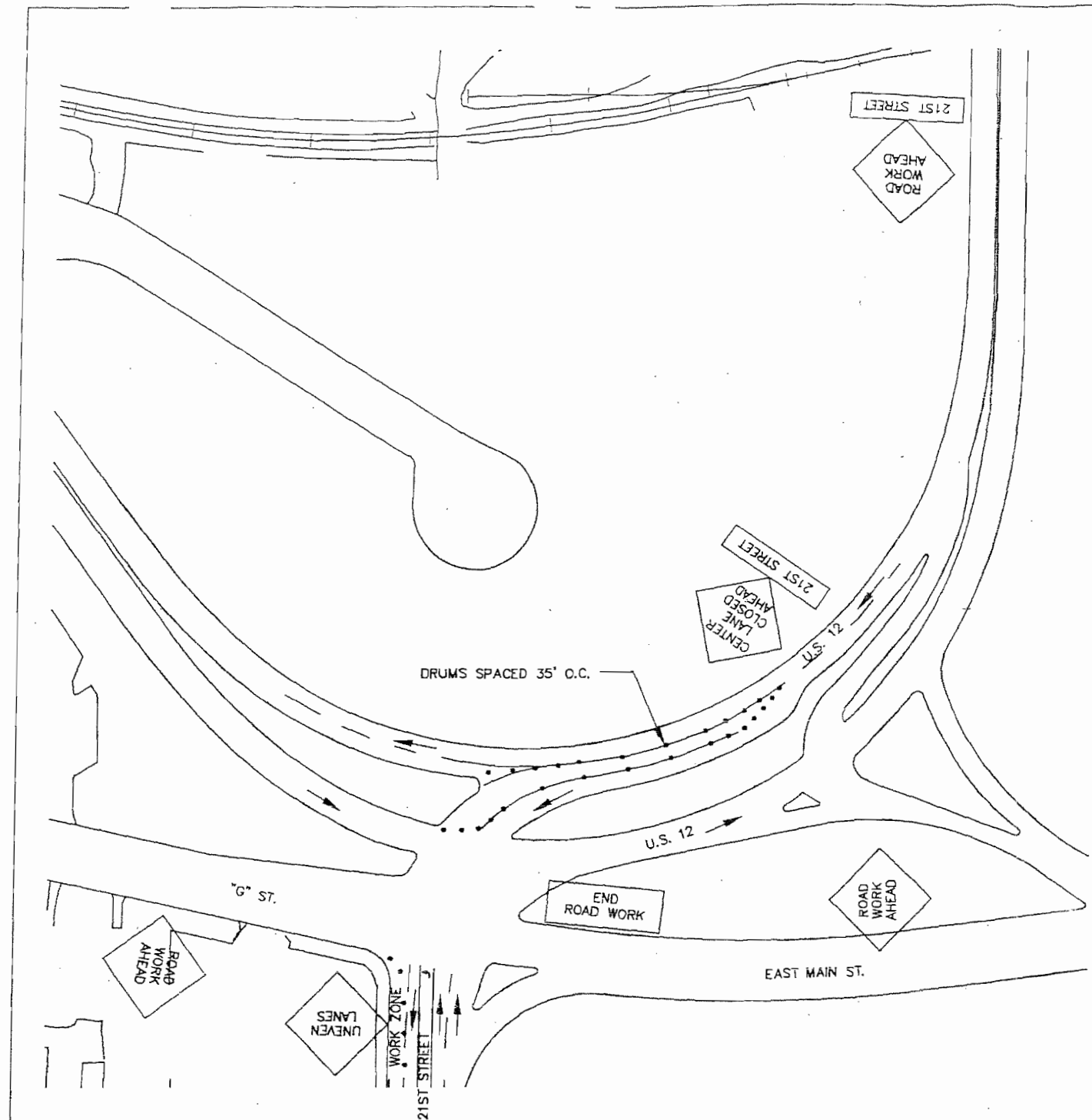
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U.S. 12 LANE CLOSURE DETAIL
N.T.S.

TRAFFIC CONTROL NOTES:

ALL TRAFFIC CONTROL PERFORMED ON THIS PROJECT SHALL BE IN ACCORDANCE WITH SECTION 113, TRAFFIC CONTROL, IN THE STANDARD TECHNICAL SPECIFICATIONS.

ALL INTERSECTING STREETS SHALL HAVE PROPER SIGNAGE TO ALERT THE DRIVER OF ROAD CONSTRUCTION AND OTHER RESTRICTIONS OR HAZARDS.

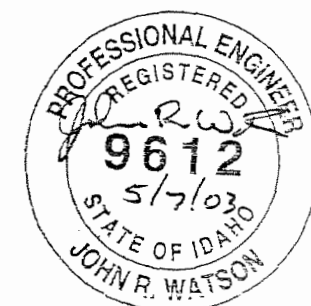
WHEN FLAGGING OPERATIONS ARE REQUIRED TO FACILITATE CONSTRUCTION, ADVANCED WARNING SIGNS SHALL BE PLACED ACCORDING TO THE MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (MUTCD). MAXIMUM VEHICLE DELAY IS 10 MINUTES.

ACCESS TO BUSINESSES SHALL BE MAINTAINED THROUGHOUT CONSTRUCTION, EXCEPT FOR BRIEF PERIODS DURING PAVING AND GRINDING OPERATIONS. THE CONTRACTOR SHALL COORDINATE ACTIVITIES WITH THE PROPERTY OWNERS.

THE CONTRACTOR SHALL PROVIDE FLAGGERS AT SIGNALIZED INTERSECTIONS WHEN CLOSURE IS REQUIRED ON THE SIDE STREET, AND WHEN CONSTRUCTION OPERATIONS LIMIT THE ABILITY OF THE SIGNALS TO EFFECTIVELY MOVE TRAFFIC.

WHEN SIDE STREETS ARE CLOSED DURING PAVING AND MILLING OPERATIONS, THE CONTRACTOR SHALL DIRECT TRAFFIC TO ALTERNATE ROUTES. CLOSURE TIMES SHALL BE KEPT TO A MINIMUM AND SHALL NOT EXTEND INTO NON-WORKING HOURS, EXCEPT AS APPROVED BY THE ENGINEER AND WITH DETOUR ROUTES IN PLACE. ROAD CLOSURE REQUESTS FOR MINOR STREETS, IF DESIRED, SHALL BE SUBMITTED FOR APPROVAL, ALONG WITH APPLICABLE TRAFFIC CONTROL DETOUR PLANS, AT LEAST 48 HOURS PRIOR TO ANTICIPATED CLOSURE.

TRAFFIC CONTROL SIGNS SHALL BE PROMPTLY REMOVED AFTER THEY ARE NO LONGER APPLICABLE OR NEEDED.



CITY OF LEWISTON		DESIGNED BY	JRW	SCALE	N.T.S.
PUBLIC WORKS DEPARTMENT		DRAWN BY	JRW	DATE	4/03
ENGINEERING SERVICES		CHECKED BY	LJC	DRAWING NO.	21st Street
1134 "F" STREET, LEWISTON, ID 83501		BY		SHEET	11 OF 11
208-746-1116 -- FAX 208-746-9667		DESCRIPTION			
2003 STREET MAINTENANCE PROJECT		NO.		DATE	
21ST STREET PAVEMENT REHABILITATION					

PUBLIC WORKS DEPT. MEMORANDUM
Engineering Services Division



TO: Dale Bloom, Purchasing Agent

FROM: John Watson, P.E., Asst. City Engineer

DATE: 6/9/03

RE: 2003 Street Maintenance Project & Country Club Drive Water Main Replacement – Recommendation to Award Contract

I have reviewed all three of the bids received on May 29, 2003 for the 2003 Street Maintenance Project and Country Club Drive Water Main Replacement Project and have found them all responsive. I recommend awarding the project to the low bidder, Poe Asphalt, Inc., a Clarkston corporation, for the Base Bid, Add Alternate A, Add Alternate B and Add Alternate D for an estimated \$855,557.46. The engineer's estimate for the project was \$897,376.81, approximately 5% above the low bid amount. The second lowest bidder was approximately 12% higher than the low bid.

The breakdown of the low bid is as follows:

	<u>Poe Asphalt</u>	<u>Engineer's Est.</u>
Base Bid:	\$691,266.47	\$702,832.25
Add Alternate A:	\$ 50,910.26	\$ 61,151.44
Add Alternate B:	\$ 23,459.23	\$ 29,414.12
Add Alternate D:	\$ 89,921.50	\$103,979.00
Total:	\$855,557.46	\$897,376.81

The project bid is broken down into four parts. The Base Bid consists of chip sealing and quality patching nearly 16 miles of city streets and alleys, overlaying Country Club Drive between Snake River Avenue and Reservoir Drive, and pavement repair of the outside lanes of 21st Street from Idaho Street to 18th Avenue. Add Alternate #A includes the chip seal of 21st Street from G Street to the Shopko intersection and Add Alternate #B includes the chip seal of Thain Road from 10th Street to Cedar Avenue. Add Alternate #D consists of replacing the existing 8" water main along Country Club Drive, from Reservoir Drive to Echo Hills Drive, with a new 8" PVC C-900 water main. New fire hydrants and services will also be included with the waterline project.

The Base Bid and Add Alternates A and B are designated towards the street maintenance budget. The total bid of these portions of the project is \$765,635.96. There is \$600,000.00 budgeted for the street maintenance project under account # 25-100-102-303-857. Public Works Department staff has reviewed the overall transportation budget

AFFIDAVIT OF JOHN WATSON IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

CL 545

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and anticipates sufficient funding within other items in the budget to cover the award as recommended. Add Alternate #D will be paid for by the Water Department under Project # 4-94, account # 8-210-213-303-937. There is \$120,000 budgeted for the project, which is well above the bid price of \$89,921.50.

Poe Asphalt listed several subcontractors for different areas of work on the project including Road Products for pavement fabric, Johnson Electric for traffic loops, AAA Sweeping for pavement grinding, and Curry, Inc. for underground utility work. All contractors listed hold a current public works license in the State of Idaho.

Please prepare the letter recommending Council accept the bid and Award the Contract to Poe Asphalt, Inc. on the next available City Council Meeting. Attached for your information is a breakdown of the bids in an itemized format.

C: File
 Joel Ristau
 Lowell Cutshaw
 Mike Chamberlain
 Dave Six
 Merritt Donlon

50

CL 547

BID TABULATION - Bid Opening: May 29, 2003 - 2:00 p.m.

				ENGINEER'S ESTIMATE		Poe Asphalt Clarkson, WA		Conmat Hayden Lake, ID		Steelman-Duff Clarkston, WA		Average Unit Price
ITEM NO.:	ITEM DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	
Base Bid												
112-1	Mobilization	1	LS	\$ 10,000.00	\$10,000.00	\$4,200.00	\$4,200.00	\$45,000.00	\$45,000.00	\$40,000.00	\$40,000.00	\$29,733.33
113-1	Traffic Control	1	LS	\$ 35,000.00	\$35,000.00	\$32,000.00	\$32,000.00	\$26,000.00	\$26,000.00	\$40,000.00	\$40,000.00	\$32,666.67
	Adjust Manholes, Frames, Lids	181	EA	\$ 400.00	\$7,200.00	\$265.00	\$4,770.00	\$250.00	\$4,500.00	\$480.00	\$8,640.00	\$331.67
	Adjust Water Valve Boxes	331	EA	\$ 220.00	\$7,280.00	\$160.00	\$5,280.00	\$150.00	\$4,950.00	\$250.00	\$8,250.00	\$186.67
114-3	Install Street Monument Case	31	EA	\$ 200.00	\$600.00	\$290.00	\$870.00	\$275.00	\$825.00	\$400.00	\$1,200.00	\$321.67
201-1	Asphalt Pavement Replacement	45	SY	\$ 15.00	\$675.00	\$25.00	\$1,125.00	\$24.00	\$1,080.00	\$18.00	\$810.00	\$25.00
201-4	Curb and Gutter	30	LF	\$ 20.00	\$600.00	\$24.00	\$720.00	\$25.00	\$750.00	\$28.00	\$780.00	\$25.00
213-1	Quality Patch 2.5"	1406	SY	\$ 14.00	\$19,884.00	\$12.50	\$17,575.00	\$13.85	\$19,473.10	\$14.70	\$20,668.20	\$13.88
213-2	Quality Patch 3"	501	SY	\$ 15.50	\$7,765.50	\$14.50	\$7,264.50	\$16.02	\$8,026.02	\$16.40	\$8,216.40	\$15.64
213-3	Quality Patch 4"	1083	SY	\$ 17.50	\$18,952.50	\$18.00	\$19,494.00	\$17.40	\$18,844.20	\$20.00	\$21,660.00	\$18.47
213-4	Quality Patch 5"	592	SY	\$ 23.00	\$13,616.00	\$22.50	\$13,320.00	\$21.04	\$12,455.68	\$22.20	\$13,142.40	\$21.91
213-5	Quality Patch 6"	44	SY	\$ 25.00	\$1,100.00	\$28.00	\$1,232.00	\$25.00	\$1,100.00	\$24.60	\$1,082.40	\$25.87
301-1	Asphalt Pavement Overlay 2" Depth, 1/2" Grad.(CCD)	12730	SY	\$ 3.75	\$47,737.50	\$4.00	\$50,920.00	\$4.09	\$52,065.70	\$5.50	\$70,015.00	\$4.53
301-2	Asphalt Pavement Overlay 3/4" Grad. (21st St.)	11115	SY	\$ 3.90	\$43,348.50	\$4.00	\$44,460.00	\$4.14	\$46,016.10	\$5.50	\$61,132.50	\$4.55
301-3	Asphalt Pavement Overlay Approaches (21st St.)	1493	SY	\$ 4.50	\$6,718.50	\$5.90	\$8,808.70	\$4.42	\$6,599.06	\$6.00	\$8,958.00	\$5.94
301-4	Asphalt Pavement Overlay, Blend Driveway (CCD)	212	SY	\$ 4.50	\$954.00	\$12.25	\$2,597.00	\$5.25	\$1,113.00	\$6.20	\$1,314.40	\$5.90
301-5	Asphalt Berm	490	LF	\$ 2.75	\$1,347.50	\$2.50	\$1,225.00	\$3.70	\$1,813.00	\$4.00	\$1,960.00	\$3.90
304-1	Excavation & Place Base Material (12" Depth) Q.P.	636	SY	\$ 8.00	\$5,088.00	\$4.72	\$3,001.92	\$13.50	\$8,586.00	\$8.50	\$5,406.00	\$4.90
306-1	Asphalt Pre-Level Course (CCD)	960	Ton	\$ 32.00	\$30,720.00	\$33.25	\$31,920.00	\$35.20	\$33,792.00	\$37.30	\$35,808.00	\$33.90
306-2	Asphalt Pre-Level Course (21st St.)	9815	SY	\$ 1.80	\$15,704.00	\$1.25	\$12,268.75	\$4.09	\$40,143.35	\$3.10	\$30,426.50	\$1.84
314-1	Street Monument	1	EA	\$ 300.00	\$300.00	\$350.00	\$350.00	\$350.00	\$350.00	\$400.00	\$400.00	\$360.00
308-1	Chip Seal	270895	SY	\$ 0.90	\$243,625.50	\$0.83	\$224,676.85	\$0.90	\$243,625.50	\$0.96	\$259,867.20	\$0.90
112-1	Fiber Reinforcement Membrane	11863	SY	\$ 1.25	\$14,828.75	\$1.45	\$17,201.35	\$1.45	\$17,201.35	\$1.50	\$17,794.50	\$1.47
115-1	Pavement Grinding (CCD)	3100	SY	\$ 2.00	\$6,200.00	\$2.45	\$7,595.00	\$1.60	\$4,960.00	\$2.70	\$8,370.00	\$2.12
115-2	Pavement Grinding (21st St.)	11115	SY	\$ 3.00	\$33,345.00	\$2.28	\$25,342.20	\$1.60	\$17,784.00	\$2.70	\$30,010.50	\$2.12
115-3	Pavement Grinding (21st St. Approaches)	1493	SY	\$ 3.50	\$5,225.50	\$2.80	\$4,180.40	\$1.80	\$2,388.80	\$2.70	\$4,031.10	\$2.12
03-1	Catch Basin	2	EA	\$ 900.00	\$1,800.00	\$1,345.00	\$2,690.00	\$1,100.00	\$2,200.00	\$900.00	\$1,800.00	\$1,080.00
05-1	12" PVC C-900 Storm Sewer Pipe	100	LF	\$ 18.00	\$1,800.00	\$41.75	\$4,175.00	\$37.50	\$3,750.00	\$30.00	\$3,000.00	\$30.00
P4-1	Traffic Loop Replacement	72	EA	\$ 450.00	\$32,400.00	\$519.00	\$37,368.00	\$585.00	\$42,120.00	\$600.00	\$43,200.00	\$588.00
P5-1	Removal of Pavement from Gutter	8145	LF	\$ 1.50	\$12,217.50	\$0.85	\$6,923.25	\$0.35	\$2,850.75	\$1.00	\$8,145.00	\$0.85
P6-1	Pavement Repair (21st St.)	1300	SY	\$ 8.00	\$10,400.00	\$10.50	\$13,850.00	\$4.85	\$6,305.00	\$14.00	\$18,200.00	\$9.85
P7-1	Pavement Reinforcing Mesh	11115	SY	\$ 4.60	\$51,129.00	\$4.92	\$54,885.80	\$4.75	\$52,796.25	\$5.00	\$55,575.00	\$4.90
P8-1	Shoulder Gravel	290	LF	\$ 4.00	\$1,160.00	\$5.65	\$1,638.50	\$8.00	\$2,320.00	\$5.00	\$1,450.00	\$5.65
P10-1	Mill and Quality Patch (2")	1113	SY	\$ 10.00	\$11,130.00	\$20.25	\$22,538.25	\$21.20	\$23,595.60	\$22.00	\$24,486.00	\$21.85
P10-3	Self-Adhesive Paving Strip Membrane	1600	LF	\$ 2.00	\$3,200.00	\$3.25	\$5,200.00	\$1.30	\$2,080.00	\$3.00	\$4,800.00	\$3.00
Total Base Bid					\$702,832.25	\$691,266.47		\$757,459.46		\$860,599.10		
Id Alternate #A: Seal Coat of 21st St from G St to Shopko Intersection												
3-1(A)	Traffic Control	1	LS	\$ 5,000.00	\$5,000.00	\$1,100.00	\$1,100.00	\$2,300.00	\$2,300.00	\$8,900.00	\$8,900.00	\$4,266.67
3-5(A)	Quality Patch (6")	1701	SY	\$ 25.00	\$4,250.00	\$15.00	\$2,550.00	\$25.00	\$4,250.00	\$25.00	\$4,250.00	\$21.67
3-1(A)	Excavation & Place Base Material (12" Depth) Q.P.	17	EA	\$ 8.00	\$136.00	\$5.00	\$85.00	\$15.50	\$263.50	\$35.00	\$595.00	\$18.50
4-1(A)	Traffic Loop Replacement	22	EA	\$ 450.00	\$9,900.00	\$519.00	\$11,418.00	\$585.00	\$12,870.00	\$600.00	\$13,200.00	\$588.00
3-1(A)	Chip Seal	8438	SY	\$ 0.88	\$40,865.44	\$0.77	\$35,757.26	\$0.90	\$41,794.20	\$1.00	\$46,438.00	\$0.89
Total Add Alternate A					\$61,151.44	\$50,910.26		\$61,977.70		\$73,383.00		

AFFIDAVIT OF GEN. WATSON IN SUPPORT OF DEFENDANT'S MOTION FOR SUBSTITUTION

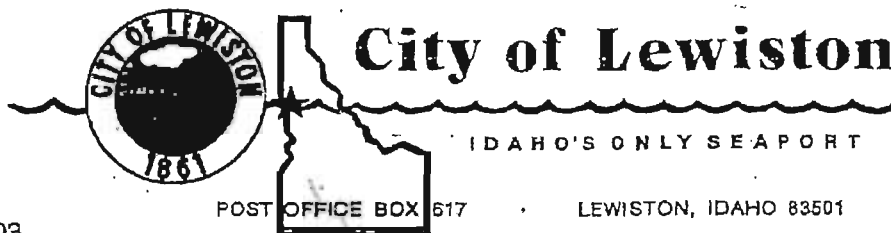
2003 Street Maintenance Project
TABULATION - Bid Opening: May 29, 2003 - 2:00 p.m.

CL 548

REPORT OF DISCREPANCIES

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				ENGINEER'S ESTIMATE		Poe Asphalt Clarkson, WA		Conmat Hayden Lake, ID		Steelman-Duff Clarkston, WA		Average Unit Price
TEM NO.	ITEM DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	
Alternate B: Seal Coat of Thain Rd from 10th St to 147' south of Cedar Ave												
13-1(B)	Traffic Control	1	LS	\$ 4,000.00	\$4,000.00	\$1,100.00	\$1,100.00	\$3,000.00	\$3,000.00	\$2,500.00	\$2,500.00	\$4,266.67
13-5(B)	Quality Patch (6")	751	SY	\$ 25.00	\$1,875.00	\$23.50	\$1,762.50	\$25.00	\$1,875.00	\$25.00	\$1,875.00	\$24.50
08-1(B)	Chio Seal	267.49	SY	\$ 0.88	\$23,539.12	\$0.77	\$20,596.73	\$0.90	\$24,074.10	\$1.00	\$26,749.00	\$0.89
Total Add Alternate B					\$29,414.12		\$23,459.23		\$33,948.10		\$31,124.00	
Total Base Bid Plus Add Alternates A & B					\$793,397.81		\$765,635.96		\$853,386.26		\$965,106.10	
Add Alternate D: Country Club Drive Water Main Replacement												
12-01(D)	Mobilization	1	LS	\$ 10,000.00	\$10,000.00	\$1,000.00	\$1,000.00	\$2,000.00	\$2,000.00	\$18,500.00	\$18,500.00	\$6,733.33
13-01(D)	Traffic Control	1	LS	\$ 4,000.00	\$4,000.00	\$2,500.00	\$2,500.00	\$5,000.00	\$5,000.00	\$10,000.00	\$10,000.00	\$5,000.00
01-01(D)	Asphalt Pavement Replacement	852	SY	\$ 20.00	\$17,040.00	\$8.00	\$6,816.00	\$21.04	\$17,928.08	\$15.00	\$12,780.00	\$20.44
01-03(D)	Sidewalk Replacement	10	SY	\$ 40.00	\$400.00	\$68.00	\$680.00	\$35.00	\$350.00	\$70.00	\$700.00	\$57.00
01-04(D)	Curb and Gutter Replacement	40	LF	\$ 25.00	\$1,000.00	\$27.00	\$1,080.00	\$24.00	\$960.00	\$29.00	\$1,160.00	\$26.67
33-01	Fire Hydrant Assembly	3	EA	\$ 1,800.00	\$5,400.00	\$1,500.00	\$4,500.00	\$1,500.00	\$4,500.00	\$2,250.00	\$6,750.00	\$1,750.00
34-01	8" C900 Class 150 PVC Water Pipe	1477	LF	\$ 23.00	\$33,971.00	\$29.50	\$43,571.50	\$29.50	\$43,571.50	\$30.00	\$44,310.00	\$29.50
34-02	16" C900 Class 150 PVC Water Pipe	66	LF	\$ 23.00	\$1,518.00	\$25.00	\$1,650.00	\$25.00	\$1,650.00	\$40.00	\$2,640.00	\$30.00
34-03	16" FL x MJ Gate Valve	8	EA	\$ 850.00	\$6,800.00	\$500.00	\$4,000.00	\$500.00	\$4,000.00	\$800.00	\$6,400.00	\$800.00
34-04	16" FL x MJ Gate Valve	2	EA	\$ 500.00	\$1,000.00	\$400.00	\$800.00	\$400.00	\$800.00	\$650.00	\$1,300.00	\$400.00
34-05	16" x 22" MJ Elbow Fitting	3	EA	\$ 150.00	\$450.00	\$200.00	\$600.00	\$200.00	\$600.00	\$180.00	\$540.00	\$200.00
34-06	18" x 11" MJ Elbow Fitting	1	EA	\$ 250.00	\$250.00	\$200.00	\$200.00	\$200.00	\$200.00	\$260.00	\$260.00	\$200.00
34-07	18" x 22" MJ Elbow Fitting	2	EA	\$ 250.00	\$500.00	\$250.00	\$500.00	\$250.00	\$500.00	\$360.00	\$720.00	\$250.00
34-08	18" x 8" FL Tee Fitting	2	EA	\$ 350.00	\$700.00	\$300.00	\$600.00	\$300.00	\$600.00	\$520.00	\$1,040.00	\$350.00
34-09	18" x 5" FL Tee Fitting	1	EA	\$ 350.00	\$350.00	\$300.00	\$300.00	\$300.00	\$300.00	\$520.00	\$520.00	\$350.00
34-10	18" x 5" FL Tee Fitting	1	EA	\$ 350.00	\$350.00	\$300.00	\$300.00	\$300.00	\$300.00	\$410.00	\$410.00	\$350.00
34-11	8" FL Coupling Adaptor	2	EA	\$ 300.00	\$600.00	\$175.00	\$350.00	\$175.00	\$350.00	\$250.00	\$500.00	\$300.00
34-12	16" FL Coupling Adaptor	2	EA	\$ 300.00	\$600.00	\$150.00	\$300.00	\$150.00	\$300.00	\$180.00	\$360.00	\$150.00
34-13	Pipeline Encasement	136	LF	\$ 50.00	\$6,800.00	\$34.00	\$4,624.00	\$34.00	\$4,624.00	\$40.00	\$5,440.00	\$34.00
34-14	Remove Existing Tee	2	EA	\$ 200.00	\$400.00	\$800.00	\$1,600.00	\$800.00	\$1,600.00	\$100.00	\$200.00	\$800.00
34-15	Remove Existing Valve	5	EA	\$ 200.00	\$1,000.00	\$500.00	\$2,500.00	\$500.00	\$2,500.00	\$100.00	\$500.00	\$500.00
34-16	Cap Abandoned Main	6	EA	\$ 100.00	\$600.00	\$250.00	\$1,500.00	\$250.00	\$1,500.00	\$80.00	\$480.00	\$250.00
34-17	Remove Existing Valve Risor	4	EA	\$ 50.00	\$200.00	\$50.00	\$200.00	\$50.00	\$200.00	\$80.00	\$320.00	\$50.00
34-18	Remove Existing Hydrant and Valve	1	EA	\$ 400.00	\$400.00	\$300.00	\$300.00	\$300.00	\$300.00	\$500.00	\$500.00	\$300.00
34-19	Connect to Existing Mains	5	EA	\$ 1,000.00	\$5,000.00	\$1,500.00	\$7,500.00	\$1,500.00	\$7,500.00	\$800.00	\$4,000.00	\$1,500.00
311-01	Cap Existing Main	1	EA	\$ 250.00	\$250.00	\$100.00	\$100.00	\$100.00	\$100.00	\$70.00	\$70.00	\$100.00
312-01	Remove Existing Meter Box	3	EA	\$ 150.00	\$450.00	\$50.00	\$150.00	\$50.00	\$150.00	\$200.00	\$600.00	\$100.00
312-02	Install 1" Water Meter Box	3	EA	\$ 600.00	\$1,800.00	\$300.00	\$900.00	\$300.00	\$900.00	\$1,000.00	\$3,000.00	\$600.00
312-03	Install 1" Service Line	3	EA	\$ 1,250.00	\$3,750.00	\$400.00	\$1,200.00	\$400.00	\$1,200.00	\$1,000.00	\$3,000.00	\$600.00
Total Bid Add Alternate D					\$103,979.00		\$89,921.50		\$104,081.58		\$125,400.00	
Total Bid Plus All Alternates					\$897,376.81		\$855,557.46		\$957,467.84		\$1,090,506.10	



June 12, 2003

(208) 746-3671

Mark Poe
Poe Asphalt & Paving Inc.
PO Box 449
Lewiston ID 83501



Dear Mark,

At their meeting of June 9, 2003, the Lewiston City Council awarded the bid for the 2003 Street Maintenance Project to your company.

Enclosed are two copies of the contract for this project. Please sign both copies (also have the last page notarized) and return them to my attention. After the City Manager signs and dates the documents, I will return one original to you.

Also enclosed is the City's Alcohol and Substance Abuse Policy. Please sign the acknowledgement form and return with the signed contracts.

If you have any questions please call me at 746-3671 ext. 212. Thank you.

Sincerely,

Dale Bloom
Purchasing Agent

DB/kt

enclosure

- c: Lowell Cutshaw, City Engineer
John Watson, Asst. Engineer
Scott Macey, Asst. Engineer
Mike Chamberlain, Street Maintenance Manager
Dave Six, Water/Wastewater Manager
Merritt Donlon, Construction Coordinator



AFFIDAVIT OF JOHN WATSON IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

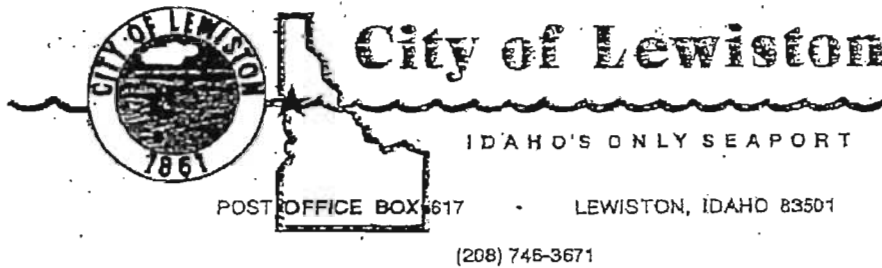
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June 26, 2003

Poe Asphalt Paving
PO Box 449
Lewiston Id. 83501

Attn: Scott Williams

RE: Summer Maintenance Project

Dear Scott

With the satisfactory completion of the Pre-Construction Conference for the above referenced project and the submittal of all required documents. This letter is to serve as your official NOTICE TO PROCEED with the work on this project. June 27, 2003 is your official start date with a completion date of September 15, 2003.

Should you have questions concerning this project, you may contact me at this office or telephone (208) 746-1316 Ext. 260

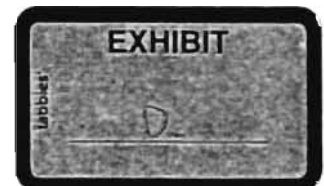
Sincerely

Merritt Donlon
Construction Coordinator

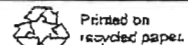
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//serv6/engineering/projects/2002StrM/notice
AFFIDAVIT OF JOHN WATSON IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT



CL 565



53

Brian K. Julian – ISB No. 2360
Amy G. White – ISB No. 5019
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: bjulian@ajhlaw.com
awhite@ajhlaw.com
Attorneys for DEFENDANT

2007 DEC 28 AM 9 23

FATTY O. WEEKS
CLERK OF THE DIST. COURT

Fung-Damm

ORIGINAL

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife, individually
and doing business as THOMPSON'S
AUTO SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political subdivision
of the State of Idaho,

Defendant.

Case No. CV07-00200

AFFIDAVIT OF KARI KUCHMAK IN
SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

STATE OF IDAHO)
) ss:
County of Nez Perce)

KARI KUCHMAK, having been first duly sworn upon oath, deposes and says:

1. That the statements contained herein are made of your Affiant's own
personal knowledge and are true and correct to the best of his information.

2. I am the Executive Assistant/Deputy City Clerk for the City of Lewiston. I
serve as the Acting City Clerk for the City of Lewiston upon the City Clerk's absence. I
have worked in the Lewiston City's Clerk office for more than eighteen years.

AFFIDAVIT OF KARI KUCHMAK IN SUPPORT OF DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT - 1

3. I assist in preparing agendas for City Council meetings. Typically, I prepare an Agenda two weeks in advance of the City Council meeting. All documents which are relevant to the City Council meeting are copied and attached to agenda. Copies are made for each City Council member and for each City administrator who needs one. Attached hereto as Exhibit "A" is a true and correct copy of the agenda for the Lewiston City Council regular meeting on June 9, 2003, without attached documents.

4. Modifications are made on the agenda and documents are added up to the day of the City Council meeting.

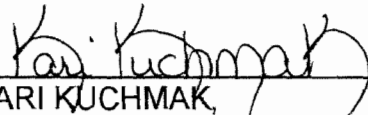
5. The City Clerk's office receives bids on construction contracts from the Lewiston City Purchasing Division. Attached hereto as Exhibit "B" is a true and correct copy of the bid documents received by the City Clerk's office from the Purchasing Division on June 9, 2003 regarding the 2003 Street Maintenance Project.

6. After the City Council meets, minutes for the meeting are prepared. Attached as Exhibit "C" is a true and correct copy of the minutes for the June 9, 2003 City Council meeting at which the 2003 Street Maintenance Project was approved.

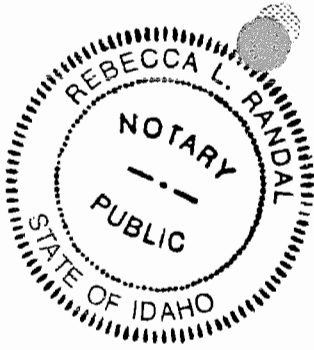
7. These bid proposals are generally approved in advance of the construction by the City Lewiston City Council.

8. The Lewiston City Council met on June 9, 2003 at Lewis Clark State College at 7:00 PM.

FURTHER your Affiant saith naught.


KARI KUCHMAK

SUBSCRIBED AND SWORN to before me this 19th day of December, 2007.



Rebecca L. Randal
Notary Public for Idaho
Residing at: Lewiston Id
My Commission Expires: 10/30/2013

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of December, 2007, I served a true and correct copy of the foregoing **AFFIDAVIT OF KARI KUCHMAK IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
Telephone: (208) 743-1516
Facsimile: (208) 746-2231

[☒] U.S. Mail, postage prepaid
[] Hand-Delivered
[] Overnight Mail
[] Facsimile (208) 746-2231

Brian K. Julian
Brian K. Julian

Agenda

**LEWISTON CITY COUNCIL
REGULAR MEETING***Revised 06/09/03***June 9, 2003 – 7:00 p.m.****Lewis Clark State College -- 500 8th Avenue
Telecommunications Classroom (Auditorium)****I. CALL TO ORDER****II. PLEDGE OF ALLEGIANCE****III. CITIZEN COMMENTS**

- *This is an opportunity for citizens to address the Council on agenda items or other items they wish to bring to the attention of the Council. Citizens are encouraged to discuss operational issues in advance with the City Manager. In consideration of others wishing to speak, please limit your remarks to three minutes.*

IV. PUBLIC HEARINGS AND PRESENTATIONS

- A. PUBLIC HEARING: ZONING AMENDMENT ZA-01-03 (material available on 05/29/03)
- *Considering an amendment to Lewiston City Code to require a carport or garage with all residential construction.*

V. CONSENT AGENDA

- A. MINUTES: MAY 5, 2003, SPECIAL MEETING; MAY 5, 2003, WORK SESSION MEETING; MAY 12, 2003, REGULAR MEETING; MAY 19, 2003, REGULAR MEETING
- B. VOUCHERS PAYABLE: 05/07/03 - \$846,421.59; 05/21/03 - \$743,410.72
- C. RESOLUTION 2003-45: APPROVING AN AMENDMENT AGREEMENT BETWEEN THE CITY AND COUNTY, AS OWNERS/LESSORS, AND THE NEZ PERCE COUNTY SHERIFF'S AIR POSSE, INC., TO REFLECT AN AMENDED DESCRIPTION OF LEASED LAND AND THAT AREA USED BY THE POSSE AND TO AMEND THE LEASE RATE ACCORDINGLY
- D. RESOLUTION 2003-09: ACCEPTING AND APPROVING A DEDICATION OF RIGHT-OF-WAY DEED FROM JON VONTERSCH TO THE CITY TO ACCEPT AN ADDITIONAL 5 FEET OF RIGHT-OF-WAY IN THE 900 BLOCK OF CEDAR AVENUE



LEWISTON CITY COUNCIL

June 9, 2003 - 7:00 p.m.

Page 2

- E. RESOLUTION 2003-44: ACCEPTING THE PUBLIC IMPROVEMENTS CONSTRUCTION PURSUANT TO THE APPROVED CONSTRUCTION PLANS FOR THE SWEET MEADOWOLD SUBDIVISION AND ESTABLISHING THE WARRANTY PERIOD
- F. RESOLUTION 2003-43: APPROVING THE ASSIGNMENT OF AN AIRPORT LEASE FROM GERALD AND VIRGINIA BATEMAN TO TERRY RUDD FOR HANGAR SPACE AT THE LEWISTON/NEZ PERCE COUNTY REGIONAL AIRPORT
- G. RESOLUTION 2003-46: APPROVING THE ASSIGNMENT OF AN AIRPORT LEASE FROM LUNETTA WRIGHT TO MICHAEL LEE PENDELL FOR SPACE IN THE AIRPORT TERMINAL BUILDING
- H. BID AWARD: 2003 SUMMER STREET MAINTENANCE PROJECT AND COUNTRY CLUB DRIVE WATER MAIN REPLACEMENT: POE ASPHALT, CLARKSTON, WA: \$855,557.46
- I. RESOLUTION 2003-47: DECLARING VARIOUS ITEMS OF MUNICIPAL PROPERTY TO BE SURPLUS
- J. BID AWARD: SIXTH STREET WATER MAIN REPLACEMENT: ATLAS SAND & ROCK, LEWISTON, IDAHO: \$226,261.11
- K. RESOLUTION 2003-50: AUTHORIZING THE EXECUTION AND DELIVERY OF MUNICIPAL REAL ESTATE IMPROVEMENTS LEASE-PURCHASE AGREEMENTS AND RELATED DOCUMENTS WITH RESPECT TO THE CONSTRUCTION OF RUNWAY IMPROVEMENTS AND OTHER IMPROVEMENTS TO THE AIRPORT TO BE USED FOR THE PUBLIC BENEFIT

VI. ACTIVE AGENDA

- A. ORDINANCE 4288 (FIRST READING)
- Amending City Code to change speed limits on U.S. Highway 12, east of 36th Street North; on Bryden Canyon Road; on 4th Street between Preston and Bryden Avenue; on Ripon Avenue between 10th Street and Barr Street; and on Barr Street south of Ripon.
- B. ORDINANCE 4320 (FIRST READING)
- Amending City Code to provide for a lifetime dog license for neutered and unneutered dogs; clarifying rabies vaccination requirements and enacting a new section prohibiting excessive noise from animals.

LEWISTON CITY COUNCIL

June 9, 2003 – 7:00 p.m.

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VII. UNFINISHED AND NEW BUSINESS

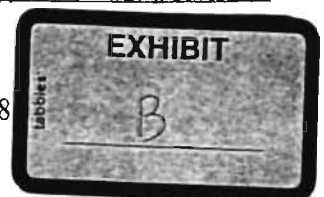
- A. COUNCIL COMMENTS
- B. CITY MANAGER COMMENTS
- C. WORK SESSION AGENDA TOPICS
- D. BOARD AND COMMISSION APPOINTMENTS

VIII. ADJOURNMENT

CITY COUNCIL MEETING
AGENDA ITEM-HISTORY/COMMENTARY



<u>ITEM TITLE</u> BID AWARD - 2003 STREET MAINTENANCE PROJECT & COUNTRY CLUB DRIVE WATER MAIN REPLACEMENT		AGENDA NO. _____ AGENDA DATE: _____	1ST Rdg. _____ 2ND Rdg. _____ 3RD Rdg. _____
<u>ORIGINATING SOURCE</u> <i>Dale Bloom, Purchasing Agent</i>		<u>FUNDING CERTIFICATION (Finance Director if applicable)</u>	
<u>DIVISION MANAGER REVIEW (If applicable)</u> <i>Dale Bloom 6/9/03</i>		<u>DEPARTMENT MANAGER REVIEW</u>	
<u>RECOMMENDED FOR COUNCIL ACTION</u>	<u>CITY MANAGER</u>		
<u>ITEM HISTORY (Previous Council Reviews, Action Related To This Item, Other Pertinent History)</u> <p>This project consists of making major repairs to certain City streets. The project will involve removal of deteriorated pavement areas, replacement with new; patching and overlay/chip seal; valve box and manhole cover adjustments; and other related rehabilitation work. Three add alternates are also part of this project. Add Alternate #A - seal coat of 21st Street from G Street to Shopko intersection; Add Alternate #B - seal coat of Thain Road from 10th Street to 147th south of Cedar Avenue; Add Alternate #D - replace existing water main on Country Club Drive with 1,477 linear feet of 8" class 900 PVC pipe.</p>			
<u>ITEM COMMENTARY (Background, Discussion, Key Points, Recommendations, Etc.) Please identify any or all impacts this proposed action would have on the City budget and/or personnel resources.</u> <p>On May 6, 2003, notices inviting bids were mailed to twenty-one (21) potential bidders. Twelve (12) interested contractors obtained bids specification packages. A pre-bid conference was held on May 13, 2003. All legal advertising requirements were completed.</p> <p>Three (3) bid proposals were received and opened on May 29, 2003. All proposals have been reviewed by Engineering staff for specification compliance. Poe Asphalt submitted the best proposal in the amount of \$855,557.46, including all three add alternates.</p> <p>Budget Impact: Funding for this project will be provided as per the attached memorandum from Assistant City Engineer John Watson.</p>			
<u>ACTION PROPOSED</u> <p>Staff recommends that the City Council accept the bid proposal of Poe Asphalt, Clarkston, WA, in the amount of \$855,557.46 and authorize the City Manager to execute a contract between Poe Asphalt and the City.</p>			



PUBLIC WORKS DEPT. MEMORANDUM
Engineering Services Division



TO: Dale Bloom, Purchasing Agent
FROM: John Watson, P.E., Asst. City Engineer
DATE: 6/9/03

RE: 2003 Street Maintenance Project & Country Club Drive Water Main Replacement - Recommendation to Award Contract

I have reviewed all three of the bids received on May 29, 2003 for the 2003 Street Maintenance Project and County Club Drive Water Main Replacement Project and have found them all responsive. I recommend awarding the project to the low bidder, Poe Asphalt, Inc., a Clarkston corporation, for the Base Bid, Add Alternate A, Add Alternate B and Add Alternate D for an estimated \$855,557.46. The engineer's estimate for the project was \$897,376.81, approximately 5% above the low bid amount. The second lowest bidder was approximately 12% higher than the low bid.

The breakdown of the low bid is as follows:

	Poe Asphalt	Engineer's Est.
Base Bid:	\$691,266.47	\$702,832.25
Add Alternate A:	\$ 50,910.26	\$ 61,151.44
Add Alternate B:	\$ 23,459.23	\$ 29,414.12
Add Alternate D:	\$ 89,921.50	\$103,979.00
Total:	\$855,557.46	\$897,376.81

The project bid is broken down into four parts. The Base Bid consists of chip sealing and quality patching nearly 16 miles of city streets and alleys, overlaying Country Club Drive between Snake River Avenue and Reservoir Drive, and pavement repair of the outside lanes of 21st Street from Idaho Street to 18th Avenue. Add Alternate #A includes the chip seal of 21st Street from G Street to the Shopko intersection and Add Alternate #B includes the chip seal of Thain Road from 10th Street to Cedar Avenue. Add Alternate #D consists of replacing the existing 8" water main along Country Club Drive, from Reservoir Drive to Echo Hills Drive, with a new 8" PVC C-900 water main. New fire hydrants and services will also be included with the waterline project.

The Base Bid and Add Alternates A and B are designated towards the street maintenance budget. The total bid of these portions of the project is \$765,635.96. There is \$600,000.00 budgeted for the street maintenance project under account # 25-100-102-303-857. Public Works Department staff has reviewed the overall transportation budget

and anticipates sufficient funding within other items in the budget to cover the award as recommended. Add Alternate #D will be paid for by the Water Department under Project # 4-94, account # 8-210-213-303-937. There is \$120,000 budgeted for the project, which is well above the bid price of \$89,921.50.

Poe Asphalt listed several subcontractors for different areas of work on the project including Road Products for pavement fabric, Johnson Electric for traffic loops, AAA Sweeping for pavement grinding, and Curry, Inc. for underground utility work. All contractors listed hold a current public works license in the State of Idaho.

Please prepare the letter recommending Council accept the bid and Award the Contract to Poe Asphalt, Inc. on the next available City Council Meeting. Attached for your information is a breakdown of the bids in an itemized format.

C: File
Joel Ristau
Lowell Cutshaw
Mike Chamberlain
Dave Six
Merritt Donlon

**CITY OF LEWISTON
P O BOX 617
LEWISTON ID 83501**

Bid Recap: "2003 STREET MAINTENANCE/COUNTRY CLUB WATER MAIN"
Bid Open Date: May 29, 2003 - 2:00 p.m.

BIDDER	BID SECURITY	BASE BID	ADD ALTERNATE A	ADD ALTERNATE B	ADD ALTERNATE C	ADD ALTERNATE D	TOTAL
Poe Asphalt PO Box 449 Lewiston ID 83501	X	\$691,266.47	\$50,910.26	\$23,459.23	N/A	\$89,921.50	\$855,557.46
Steelman-Duff Inc. 1490 Fair Street Clarkston WA 99403	X	\$860,599.10	\$73,383.00	\$31,124.00	N/A	\$125,400.00	\$1,090,506.10
Conmat PO Box 1718 Hayden Lake ID 83835	X	\$757,459.46	\$61,977.70	\$26,749.10	N/A	\$104,081.58	\$950,267.84

AFFIDAVIT OF KARI KUCHMAK IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT CL 561

project: 2003 Street Maintenance Project

14 TABULATION - Bld Opening: May 29, 2003 - 2:00 p.m.

10/09/2007 18:51

CITY OF LEVISTON

PAX 74

10/09/2007 18:51

				ENGINEER'S ESTIMATE		Poe Asphalt Clarkson, WA		Conmat Hayden Lake, ID		Steelman-Duff Clarkston, WA		
EM NO.	ITEM DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	Average Unit Price
Base Bld												
2-1	Mobilization	1	LS	\$ 10,000.00	\$10,000.00	\$4,200.00	\$4,200.00	\$45,000.00	\$45,000.00	\$40,000.00	\$40,000.00	\$29,733.33
3-1	Traffic Control	1	LS	\$ 35,000.00	\$35,000.00	\$32,000.00	\$32,000.00	\$26,000.00	\$26,000.00	\$40,000.00	\$40,000.00	\$32,666.67
4-1	Adjust Manholes, Frames, Lids	18	EA	\$ 400.00	\$7,200.00	\$265.00	\$4,770.00	\$250.00	\$4,500.00	\$480.00	\$8,640.00	\$311.67
4-2	Adjust Water Valve Boxes	33	EA	\$ 220.00	\$7,260.00	\$160.00	\$5,280.00	\$150.00	\$4,950.00	\$250.00	\$8,250.00	\$166.67
4-3	Install Street Monument Case	3	EA	\$ 200.00	\$600.00	\$290.00	\$870.00	\$275.00	\$825.00	\$400.00	\$1,200.00	\$321.67
11-1	Asphalt Pavement Replacement	45	SY	\$ 15.00	\$675.00	\$25.00	\$1,125.00	\$24.00	\$1,080.00	\$18.00	\$810.00	\$22.33
11-4	Curb and Gutter	30	LF	\$ 20.00	\$600.00	\$24.00	\$720.00	\$25.00	\$750.00	\$26.00	\$780.00	\$25.00
3-1	Quality Patch 2.5"	1406	SY	\$ 14.00	\$19,684.00	\$12.50	\$17,575.00	\$13.85	\$19,473.10	\$14.70	\$20,658.20	\$13.68
	Quality Patch 3"	501	SY	\$ 15.50	\$7,765.50	\$14.50	\$7,264.50	\$16.02	\$8,026.02	\$16.40	\$8,218.40	\$15.64
	Quality Patch 4"	1083	SY	\$ 17.50	\$18,952.50	\$16.00	\$19,494.00	\$17.40	\$18,844.20	\$20.00	\$21,660.00	\$18.47
3-4	Quality Patch 5"	592	SY	\$ 23.00	\$13,616.00	\$22.50	\$13,320.00	\$21.04	\$12,455.88	\$22.20	\$13,142.40	\$21.91
3-5	Quality Patch 6"	44	SY	\$ 25.00	\$1,100.00	\$28.00	\$1,232.00	\$25.00	\$1,100.00	\$24.60	\$1,082.40	\$25.67
11-1	Asphalt Pavement Overlay 2" Depth, 1/2" Grad.(CCD)	12730	SY	\$ 3.75	\$47,737.50	\$4.00	\$50,920.00	\$4.09	\$52,065.70	\$5.50	\$70,015.00	\$4.53
11-2	Asphalt Pavement Overlay 3/4" Grad. (21st St.)	11115	SY	\$ 3.80	\$43,348.50	\$4.00	\$44,460.00	\$4.14	\$46,018.10	\$5.80	\$61,132.50	\$4.55
11-3	Asphalt Pavement Overlay Approaches (21st St.)	1493	SY	\$ 4.50	\$6,718.50	\$5.80	\$8,608.70	\$4.42	\$6,599.06	\$8.00	\$8,958.00	\$5.44
11-4	Asphalt Pavement Overlay, Blend Driveway (CCD)	212	SY	\$ 4.50	\$954.00	\$12.25	\$2,597.00	\$5.25	\$1,113.00	\$8.20	\$1,314.40	\$7.90
11-5	Asphalt Berm	490	LF	\$ 2.75	\$1,347.50	\$2.50	\$1,225.00	\$3.70	\$1,813.00	\$4.00	\$1,960.00	\$3.40
14-1	Excavation & Place Base Material (12" Depth) Q.P.	636	SY	\$ 6.00	\$5,088.00	\$4.72	\$3,001.92	\$13.50	\$8,586.00	\$8.50	\$5,406.00	\$8.91
16-1	Asphalt Pre-Level Course (CCD)	980	Ton	\$ 32.00	\$30,720.00	\$33.25	\$31,920.00	\$35.20	\$33,792.00	\$37.30	\$35,808.00	\$35.25
16-2	Asphalt Pre-Level Course (21st St.)	9815	SY	\$ 1.60	\$15,704.00	\$1.25	\$12,268.75	\$4.09	\$40,143.35	\$3.10	\$30,426.50	\$2.81
4-1	Street Monument	1	EA	\$ 300.00	\$300.00	\$350.00	\$350.00	\$350.00	\$350.00	\$400.00	\$400.00	\$368.67
18-1	Chip Seal	270685	SY	\$ 0.80	\$243,625.50	\$0.83	\$224,676.85	\$0.80	\$243,625.50	\$0.86	\$259,887.20	\$0.80
2-1	Fiber Reinforcement Membrane	11863	SY	\$ 1.25	\$14,828.75	\$1.45	\$17,201.35	\$1.45	\$17,201.35	\$1.50	\$17,794.50	\$1.47
5-1	Pavement Grinding (CCD)	3100	SY	\$ 2.00	\$8,200.00	\$2.45	\$7,595.00	\$1.80	\$4,960.00	\$2.70	\$8,370.00	\$2.25
5-2	Pavement Grinding (21st St.)	11115	SY	\$ 3.00	\$33,345.00	\$2.28	\$25,342.20	\$1.80	\$17,784.00	\$2.70	\$30,010.50	\$2.18
5-3	Pavement Grinding (21st St. Approaches)	1493	SY	\$ 3.50	\$5,225.50	\$2.80	\$4,180.40	\$1.80	\$2,388.80	\$2.70	\$4,031.10	\$2.37
13-1	Catch Basin	2	EA	\$ 900.00	\$1,800.00	\$1,345.00	\$2,690.00	\$1,100.00	\$2,200.00	\$900.00	\$1,800.00	\$1,115.00
15-1	12" PVC C-900 Storm Sewer Pipe	100	LF	\$ 18.00	\$1,800.00	\$41.75	\$4,175.00	\$37.50	\$3,750.00	\$30.00	\$3,000.00	\$36.42
14-1	Traffic Loop Replacement	72	EA	\$ 450.00	\$32,400.00	\$519.00	\$37,368.00	\$585.00	\$42,120.00	\$600.00	\$43,200.00	\$588.00
15-1	Removal of Pavement from Gutter	8145	LF	\$ 1.50	\$12,217.50	\$0.85	\$6,923.25	\$0.35	\$2,850.75	\$1.00	\$8,145.00	\$0.73
14-1	Pavement Repair (21st St.)	1300	SY	\$ 8.00	\$10,400.00	\$10.50	\$13,650.00	\$4.85	\$6,305.00	\$14.00	\$18,200.00	\$9.78
	Pavement Reinforcing Mesh	11115	SY	\$ 4.60	\$51,128.00	\$4.92	\$54,685.80	\$4.75	\$52,796.25	\$5.00	\$55,575.00	\$4.89
14-1	Shoulder Gravel	280	LF	\$ 4.00	\$1,160.00	\$5.85	\$1,638.00	\$8.00	\$2,320.00	\$5.00	\$1,450.00	\$6.22
10-1	Mill and Quality Patch (2")	1113	SY	\$ 10.00	\$11,130.00	\$20.25	\$22,538.25	\$21.20	\$23,695.80	\$22.00	\$24,488.00	\$21.15
10-3	Self-Adhesive Paving Strip Membrane	1600	LF	\$ 2.00	\$3,200.00	\$3.25	\$5,200.00	\$1.30	\$2,080.00	\$3.00	\$4,800.00	\$2.52
Total Base Bld					\$702,832.25	\$891,268.47		\$757,459.48		\$880,599.10		
Add Alternate #A: Seal Coat of 21st St from G St to Shopko Intersection												
3-1(A)	Traffic Control	1	LS	\$ 6,000.00	\$6,000.00	\$1,100.00	\$1,100.00	\$2,800.00	\$2,800.00	\$8,900.00	\$8,900.00	\$4,286.67
3-5(A)	Quality Patch (8")	170	SY	\$ 25.00	\$4,250.00	\$15.00	\$2,550.00	\$26.00	\$4,260.00	\$25.00	\$4,250.00	\$21.67
14-1(A)	Excavation & Place Base Material (12" Depth) Q.P.	17	EA	\$ 8.00	\$136.00	\$5.00	\$85.00	\$16.50	\$283.50	\$35.00	\$595.00	\$16.50
14-1(A)	Traffic Loop Replacement	22	EA	\$ 450.00	\$9,900.00	\$518.00	\$11,418.00	\$585.00	\$12,870.00	\$600.00	\$13,200.00	\$588.00
18-1(A)	Chip Seal	48438	SY	\$ 0.88	\$40,665.44	\$0.77	\$35,757.28	\$0.80	\$41,784.20	\$1.00	\$48,438.00	\$0.89
Total Add Alternate A					\$81,151.44	\$50,910.28		\$81,977.70		\$73,383.00		

AFFIDAVIT OF KARI KUCHMAK IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT CL 562

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Project: 2003 Street Maintenance Project

BID TABULATION - Bid Opening: May 29, 2003 - 2:00 p.m.

15
10/08/2007 16:51
C:\angr\projects\2003\BID Documents\Bld Tab.xls

				ENGINEER'S ESTIMATE		Poe Asphalt Clarkson, WA		Conmat Hayden Lake, ID		Steelman-Duff Clarkston, WA		Average Unit Price
ITEM NO.	ITEM DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	UNIT PRICE	AMOUNT	
Add Alternate #B: Seal Coat of Thain Rd from 10th St to 147' south of Cedar Ave												
113-1(B)	Traffic Control	1	LS	\$ 4,000.00	\$4,000.00	\$1,100.00	\$1,100.00	\$8,000.00	\$8,000.00	\$2,500.00	\$2,500.00	\$3,866.67
113-5(B)	Quality Patch (6")	75	SY	\$ 25.00	\$1,875.00	\$23.50	\$1,762.50	\$25.00	\$1,875.00	\$25.00	\$1,875.00	\$24.50
108-1(B)	Chip Seal	26749	SY	\$ 0.88	\$23,539.12	\$0.77	\$20,596.73	\$0.90	\$24,074.10	\$1.00	\$26,749.00	\$0.89
Total Add Alternate B					\$29,414.12		\$23,459.23		\$33,949.10		\$31,124.00	
Total Base Bid Plus Add Alternates A & B					\$793,397.81		\$765,835.98		\$853,388.28		\$985,108.10	

Alternate D: Country Club Drive Water Main Replacement												
12-01(D)	Mobilization	1	LS	\$ 10,000.00	\$10,000.00	\$1,000.00	\$1,000.00	\$2,000.00	\$2,000.00	\$18,900.00	\$18,900.00	\$6,833.33
13-01(D)	Traffic Control	1	LS	\$ 4,000.00	\$4,000.00	\$2,500.00	\$2,500.00	\$5,000.00	\$5,000.00	\$10,000.00	\$10,000.00	\$5,833.33
01-01(D)	Asphalt Pavement Replacement	852	SY	\$ 20.00	\$17,040.00	\$8.00	\$6,816.00	\$21.04	\$17,928.08	\$15.00	\$12,780.00	\$14.88
01-03(D)	Blidewalk Replacement	10	SY	\$ 40.00	\$400.00	\$68.00	\$680.00	\$95.00	\$950.00	\$70.00	\$700.00	\$57.87
01-04(D)	Curb and Gutter Replacement	40	LF	\$ 25.00	\$1,000.00	\$27.00	\$1,080.00	\$24.00	\$960.00	\$29.00	\$1,160.00	\$28.67
03-01	Fire Hydrant Assembly	3	EA	\$ 1,800.00	\$5,400.00	\$1,500.00	\$4,500.00	\$1,500.00	\$4,500.00	\$2,250.00	\$6,750.00	\$1,750.00
04-01	8" C800 Class 150 PVC Water Pipe	1477	LF	\$ 23.00	\$33,971.00	\$28.50	\$42,571.50	\$28.50	\$42,571.50	\$30.00	\$44,310.00	\$29.67
04-02	6" C800 Class 150 PVC Water Pipe	66	LF	\$ 23.00	\$1,518.00	\$25.00	\$1,650.00	\$24.00	\$1,584.00	\$40.00	\$2,640.00	\$30.00
04-03	8" FL x MJ Gate Valve	8	EA	\$ 650.00	\$5,200.00	\$500.00	\$4,000.00	\$500.00	\$4,000.00	\$800.00	\$6,400.00	\$600.00
04-04	8" FL x MJ Gate Valve	2	EA	\$ 500.00	\$1,000.00	\$400.00	\$800.00	\$400.00	\$800.00	\$650.00	\$1,300.00	\$483.33
04-05	6" x 22" MJ Elbow Fitting	3	EA	\$ 150.00	\$450.00	\$200.00	\$600.00	\$200.00	\$600.00	\$180.00	\$540.00	\$193.33
04-06	8" x 11" MJ Elbow Fitting	1	EA	\$ 260.00	\$260.00	\$200.00	\$200.00	\$200.00	\$200.00	\$280.00	\$280.00	\$220.00
04-07	8" x 22" MJ Elbow Fitting	2	EA	\$ 250.00	\$500.00	\$250.00	\$500.00	\$250.00	\$500.00	\$380.00	\$760.00	\$286.67
04-08	8" x 8" FL Tee Fitting	2	EA	\$ 350.00	\$700.00	\$300.00	\$600.00	\$300.00	\$600.00	\$320.00	\$640.00	\$373.33
04-09	8" x 8" FL Tee Fitting	1	EA	\$ 350.00	\$350.00	\$300.00	\$300.00	\$300.00	\$300.00	\$420.00	\$420.00	\$373.33
04-10	8" x 6" FL Tee Fitting	1	EA	\$ 350.00	\$350.00	\$300.00	\$300.00	\$300.00	\$300.00	\$410.00	\$410.00	\$336.67
04-11	8" FL Coupling Adaptor	2	EA	\$ 300.00	\$600.00	\$175.00	\$350.00	\$175.00	\$350.00	\$250.00	\$500.00	\$200.00
04-12	6" FL Coupling Adaptor	2	EA	\$ 300.00	\$600.00	\$150.00	\$300.00	\$150.00	\$300.00	\$180.00	\$360.00	\$160.00
04-13	Pipeline Encasement	136	LF	\$ 50.00	\$6,800.00	\$34.00	\$4,624.00	\$34.00	\$4,624.00	\$40.00	\$5,440.00	\$36.00
04-14	Remove Existing Tee	2	EA	\$ 200.00	\$400.00	\$600.00	\$1,200.00	\$800.00	\$1,600.00	\$100.00	\$200.00	\$433.33
04-15	Remove Existing Valve	5	EA	\$ 200.00	\$1,000.00	\$500.00	\$2,500.00	\$500.00	\$2,500.00	\$100.00	\$500.00	\$368.67
04-16	Cap Abandoned Main	6	EA	\$ 100.00	\$600.00	\$250.00	\$1,500.00	\$250.00	\$1,500.00	\$80.00	\$480.00	\$193.33
04-17	Remove Existing Valve Risor	4	EA	\$ 50.00	\$200.00	\$50.00	\$200.00	\$50.00	\$200.00	\$80.00	\$320.00	\$80.00
04-18	Remove Existing Hydrant and Valve	1	EA	\$ 400.00	\$400.00	\$300.00	\$300.00	\$300.00	\$300.00	\$500.00	\$500.00	\$386.67
04-19	Connect to Existing Mains	5	EA	\$ 1,000.00	\$5,000.00	\$1,500.00	\$7,500.00	\$1,500.00	\$7,500.00	\$800.00	\$4,000.00	\$1,266.67
P11-01	Cap Existing Main	1	EA	\$ 250.00	\$250.00	\$100.00	\$100.00	\$100.00	\$100.00	\$70.00	\$70.00	\$90.00
P12-01	Remove Existing Meter Box	3	EA	\$ 150.00	\$450.00	\$50.00	\$150.00	\$50.00	\$150.00	\$200.00	\$600.00	\$100.00
P12-02	Install 1" Water Meter Box	3	EA	\$ 600.00	\$1,800.00	\$300.00	\$900.00	\$300.00	\$900.00	\$1,000.00	\$3,000.00	\$533.33
P12-03	Install 1" Service Line	3	EA	\$ 1,250.00	\$3,750.00	\$400.00	\$1,200.00	\$400.00	\$1,200.00	\$1,000.00	\$3,000.00	\$800.00
Total Bid Add Alternate D					\$103,979.00		\$89,921.50		\$104,081.58		\$125,400.00	
Total Bid Plus All Alternates					\$897,376.81		\$855,567.48		\$957,469.84		\$1,090,508.10	

AFFIDAVIT OF KARI KUCHMAK IN SUPPORT OF DEFENDANT'S CL 563
MOTION FOR SUMMARY JUDGMENT

65

June 9, 2003

The Lewiston City Council met in Regular Session Monday, June 9, 2003, on the Lewis Clark State College Campus, in the Library Building, Telecommunications Conference Room, 500 8th Avenue, Lewiston. Mayor Nessel called the meeting to order at 7:00 p.m.

I. CALL TO ORDER AND ROLL CALL

Councilmembers Present: Nessel, Poole, Barker, Currin, Davis, McMillen, Wallace.

II. PLEDGE OF ALLEGIANCE

The audience joined in reciting the Pledge of Allegiance, which was led by Councilmember Currin.

III. CITIZEN COMMENTS: *Provides an opportunity for citizens to address the Council. Citizens are encouraged to discuss these issues in advance with the City Manager. The role of the Council is to establish policy. Operational issues are the responsibility of the City Manager. Citizens are asked to limit their remarks to three minutes.*

There were no citizen comments.

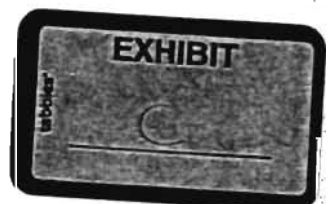
IV. PUBLIC HEARINGS AND PRESENTATIONS

A. PUBLIC HEARING: ZONING AMENDMENT ZA-01-03: *Considering an amendment to the Lewiston City Code to require a carport or garage with all residential construction.*

Stating it was the time and place advertised for the public hearing in ZA-01-03, Mayor Nessel declared the hearing open and called for staff input.

Mr. Brian Rusche, Planner, reviewed that the proposal before the Council would provide for the construction of a garage or carport when a single-family dwelling, whether manufactured or conventional, is constructed in Lewiston.

In response to questions raised during earlier discussions on this subject, Mr. Rusche explained that the value of a typical 200 square-foot one-car carport is \$2,984, a 200 square-foot one-car garage \$4,228, and a 400 square-foot two-car garage \$8,456.



*Regular Meeting Minutes**LEWISTON CITY COUNCIL**June 9, 2003*

According to Mr. Brad Cannon of the Contractor's Association, the group unanimously supports the proposal to require a carport or garage with all new single-family development.

Current City Code requires two off-street parking spaces for each residential dwelling unit. The Code does not require the paving of driveways. Also, a code amendment would not be necessary to ensure adequate setbacks to allow for construction of a garage or carport.

Councilmember McMillen questioned the number of homes constructed within recent months that did not include a garage or carport. Mr. Rusche responded that there were 95 new single-family dwellings constructed in the calendar years 2000 through 2002. Of those, 88 were built with garages or carports and 7 were not. Four of those without garages or carports were Lewis-Clark Habitat for Humanity Partnership projects.

Mayor Nettet called for audience testimony regarding the amendment.

Mr. Bill Daehling, President, Lewis-Clark Chapter of Habitat for Humanity, 3743 Swallows Nest Court, Clarkston, opposed the amendment because of the costs for Habitat homeowners. He estimated the requirement would increase monthly payments by \$25 to \$30 for 20 years.

Mr. Keith Havens, 1422 Powers Avenue, stated that a requirement for a garage or carport would have prevented him from building their dream home. Although a garage was subsequently added, it would have been impossible to construct it in conjunction with the dwelling structure because of cost.

There were no other audience comments and the hearing was closed.

Mayor Pro Tem Poole moved to amend the motion to require that single-family lots be of sufficient size to provide for the construction of a garage or carport. There was no second, and the motion was lost.

Councilmember McMillen moved to amend the ordinance to remove the requirement for a garage or carport when a single-family dwelling is constructed or a manufactured home is placed in Lewiston. The motion was seconded by Councilmember Wallace, and carried with six ayes. ROLL CALL VOTE: VOTING AYE: Nettet, Poole, Currin, Davis, McMillen, Wallace. VOTING NAY: Barker.

Regular Meeting MinutesLEWISTON CITY COUNCIL

June 9, 2003

V. CONSENT AGENDA

Mayor Nasset advised that items listed on the Consent Agenda are considered routine in nature, and enacted with one motion, unless a Councilmember wishes to remove an item for further discussion. Any items removed from the Consent Agenda are considered under the Active Agenda.

Mayor Nasset noted a correction to Resolution 2003-50, Page 3, Line 2, "2002" should read "2003."

There being no further corrections, nor requests for deletion from the Consent Agenda, Councilmember Currin moved to suspend the rules and to read the Consent Agenda by title only. The motion was seconded by Councilmember Davis and carried with seven ayes. ROLL CALL VOTE: VOTING AYE: Nasset, Poole, Barker, Currin, Davis, McMillen, Wallace. VOTING NAY: None.

A. MEETING MINUTES:

Special Meeting: May 5, 2003

Work Session Meeting: May 5, 2003

Regular Meetings: May 12 and May 19, 2003

B. VOUCHERS PAYABLE:

May 7, 2003: \$846,421.59

May 21, 2003: \$743,410.72

C. RESOLUTION 2003-45: "A RESOLUTION APPROVING AN AMENDMENT AGREEMENT BETWEEN THE CITY OF LEWISTON AND NEZ PERCE COUNTY, IDAHO, AS LESSORS, AND NEZ PERCE COUNTY SHERIFF'S AIR POSSE, INC., AN IDAHO CORPORATION, AS LESSEE; AUTHORIZING AND DIRECTING THE MAYOR AND CITY CLERK TO EXECUTE AND ATTEST, RESPECTIVELY, SAID AMENDMENT AGREEMENT; AND PROVIDING AN EFFECTIVE DATE."

D. RESOLUTION 2003-09: "A RESOLUTION ACCEPTING AND APPROVING A DEDICATION OF RIGHT-OF-WAY DEED FROM JON VONTERSCH, A SINGLE PERSON, AS GRANTOR; AND PROVIDING AN EFFECTIVE DATE."

E. RESOLUTION 2003-44: "A RESOLUTION ACCEPTING THE PUBLIC IMPROVEMENTS CONSTRUCTED PURSUANT TO THE APPROVED

*Regular Meeting Minutes**LEWISTON CITY COUNCIL**June 9, 2003*

CONSTRUCTION PLANS FOR THE SWEET MEADOWOLD SUBDIVISION; ESTABLISHING THE DATE FROM WHICH THE ONE YEAR WARRANTY PERIOD SHALL BEGIN; AND PROVIDING AN EFFECTIVE DATE."

- F. RESOLUTION 2003-43: "A RESOLUTION APPROVING THE ASSIGNMENT OF AN AIRPORT LEASE FROM GERALD D. BATEMAN TO TERRY R. RUDD, AS SUCCESSOR LESSEE; PROVIDING THAT THE SUCCESSOR LESSEE BE SUBJECT TO ALL OBLIGATIONS OF THE ORIGINAL LEASE AND PROVIDING AN EFFECTIVE DATE."
- G. RESOLUTION 2003-46: "A RESOLUTION APPROVING THE ASSIGNMENT OF AN AIRPORT LEASE FROM LUNETTA R. WRIGHT TO MICHAEL LEE PENDELL, AS SUCCESSOR LESSEE; PROVIDING THAT THE SUCCESSOR LESSEE BE SUBJECT TO ALL OBLIGATIONS OF THE ORIGINAL LEASE AND PROVIDING AN EFFECTIVE DATE."
- H. BID AWARD: ACCEPTING THE BID PROPOSAL OF POE ASPHALT OF CLARKSTON, WASHINGTON, FOR THE 2003 STREET MAINTENANCE AND COUNTRY CLUB DRIVE WATER LINE REPLACEMENT PROJECTS IN THE AMOUNT OF \$855,557.46 AND AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT BETWEEN POE ASPHALT AND THE CITY
- I. RESOLUTION 2003-47: "A RESOLUTION DECLARING VARIOUS ITEMS OF MUNICIPAL PROPERTY TO BE SURPLUS; AND PROVIDING AN EFFECTIVE DATE."
- J. BID AWARD: ACCEPTING THE BID PROPOSAL OF ATLAS SAND & ROCK OF LEWISTON, IDAHO, FOR THE SIXTH STREET WATER MAIN REPLACEMENT PROJECT, IN THE AMOUNT OF \$226,261.11 AND AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT BETWEEN ATLAS SAND & ROCK AND THE CITY
- K. RESOLUTION 2003-50: "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LEWISTON, IDAHO, AUTHORIZING THE EXECUTION AND DELIVERY OF MUNICIPAL REAL ESTATE IMPROVEMENTS, LEASE-PURCHASE AGREEMENT, AND RELATED DOCUMENTS WITH RESPECT TO THE CONSTRUCTION OF RUNWAY IMPROVEMENTS AND OTHER IMPROVEMENTS TO THE AIRPORT TO BE USED FOR THE PUBLIC BENEFIT; AUTHORIZING THE EXECUTING AND DELIVERY OF DOCUMENTS REQUIRED IN

Regular Meeting Minutes**LEWISTON CITY COUNCIL****June 9, 2003**

CONNECTION THEREWITH; AND AUTHORIZING THE TAKING OF ALL OTHER ACTIONS NECESSARY TO THE CONSUMMATION OF THE TRANSACTIONS CONTEMPLATED BY THIS RESOLUTION; AND PROVIDING EFFECTIVE DATE."

Upon a motion made by Councilmember Barker, seconded by Mayor Pro Tem Poole, the Council voted to adopt the Consent Agenda, ROLL CALL VOTE: VOTING AYE: Nessel, Poole, Barker, Currin, Davis, McMillen, Wallace. VOTING NAY: None.

VI. ACTIVE AGENDA

- A. **ORDINANCE 4288 (FIRST READING):** *Amending City Code to change speed limits on U.S. Highway 12, east of 36th Street North; on Bryden Canyon Road; on 4th Street between Preston and Bryden Avenue; on Ripon Avenue between 10th Street and Barr Street; and on Barr Street south of Ripon.*

Councilmember McMillen moved to read Ordinance 4288 by title only for the first time. The motion was seconded by Councilmember Wallace. ROLL CALL VOTE: VOTING AYE: Nessel, Poole, Barker, Currin, Davis, McMillen, Wallace. VOTING NAY: None.

ORDINANCE 4288: "AN ORDINANCE AMENDING LEWISTON CITY CODE SECTION 35-32 PROVIDING FOR SPEED LIMITS ON US HIGHWAY 12, EAST OF 36TH STREET NORTH; ON BRYDEN CANYON ROAD; 4TH STREET, BETWEEN PRESTON AVENUE AND BRYDEN AVENUE; RIPON AVENUE, BETWEEN 10TH STREET AND BARR STREET; AND BARR STREET SOUTH OF RIPON; AND PROVIDING AN EFFECTIVE DATE."

- B. **ORDINANCE 4320 (FIRST READING):** *Amending City Code to provide for a lifetime dog license for neutered and unneutered dogs; clarifying rabies vaccination requirements and enacting a new section prohibiting excessive noise from animals.*

Upon a motion made by Councilmember Wallace, seconded by Councilmember McMillen, the Council voted to read Ordinance 4320 by title only. ROLL CALL VOTE: VOTING AYE: Nessel, Poole, Barker, Currin, Davis, McMillen, Wallace. VOTING NAY: None.

ORDINANCE 4320: "AN ORDINANCE AMENDING LEWISTON CITY CODE SECTIONS 8-24 AND 8-25, PROVIDING LIFETIME DOG LICENSE FEES FOR NEUTERED AND UNNEUTERED DOGS; CLARIFYING RABIES

*Regular Meeting Minutes**LEWISTON CITY COUNCIL**June 9, 2003*

VACCINATION REQUIREMENTS; ENACTING A NEW SECTION TO BE CODIFIED AS LEWISTON CITY CODE SECTION 8-3, PROHIBITING EXCESSIVE NOISE FROM ANIMALS AND AMENDING LEWISTON CITY CODE SECTION 24-38 DELETING EXCESSIVE ANIMAL NOISE; AND PROVIDING AN EFFECTIVE DATE."

VII. UNFINISHED AND NEW BUSINESS

A. COUNCIL COMMENTS

Mayor Nasset offered his congratulations to the team members and coaching staff of the Lewis Clark Warrior Baseball team for their 2003 NAIA victory. He also applauded the efforts of Councilmember Barker's daughter Devon for her 8th place finish in the women's world kayaking competition.

B. CITY MANAGER COMMENTS

There were no City Manager comments.

C. WORK SESSION AGENDA ITEMS

There were no new work session topics raised for future discussion.

D. BOARD AND COMMISSION APPOINTMENTS

Based on the recommendation of the subcommittee charged with filling vacancies on the Library Board, Mr. Ron Wise was appointed to an additional five-year term.

VIII. ADJOURNMENT

There being no further business to come before the Council, Mayor Nasset adjourned the June 9, 2003, Regular City Council Meeting at 7:38 p.m.

FILED

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FATTY O. WEEKS
CLERK OF THE DIST. COURT
Regina Damm
DEPUTY

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Amy G. White – ISB No. 5019
ANDERSON, JULIAN & HULL LLP
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E-Mail: bjulian@ajhlaw.com
awhite@ajhlaw.com

Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually and doing business as
THOMPSON'S AUTO SALES, INC., an
Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision of the State of Idaho,

Defendant.

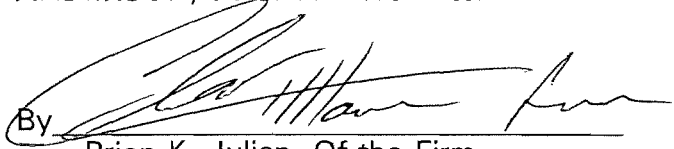
Case No. CV07-00200

**MOTION FOR SUMMARY
JUDGMENT**

COMES NOW Defendant City of Lewiston, by and through its attorneys of record, Anderson Julian & Hull, LLP, hereby moves this Court for Summary Judgment pursuant to Rule 56 of the Idaho Rules of Civil Procedure. The basis for this Motion is that the Defendant, the City of Lewiston, is immune and has no liability in this matter pursuant to I.C. §§ 6-904(1) and (7). Said Motion is supported by the Memorandum in Support of Motion for Summary Judgment, the Affidavit of John Watson and the Affidavit of Kari Kuchmak, all of which are filed contemporaneously herewith

DATED this ²⁶26 day of December, 2007.

ANDERSON, JULIAN & HULL LLP


By 
Brian K. Julian, Of the Firm
Attorneys for DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of December, 2007, I served a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
Telephone: (208) 743-1516
Facsimile: (208) 746-2231

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 746-2231


Brian K. Julian

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FILED

2007 DEC 28 AM 9 23

PATTY C. WEEKS
CLERK OF THE DIST. COURT

Patty C. Weeks
DEPUTY

Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife, individually
and doing business as THOMPSON'S
AUTO SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political subdivision
of the State of Idaho,

Defendant.

Case No. CV07-00200

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW Defendant City of Lewiston, by and through its attorneys of
records, Anderson Julian & Hull, LLP, and submits its Memorandum in Support of
Motion for Summary Judgment.

I.

INTRODUCTION

Plaintiffs Tim Thompson, Janet Thompson, and Thompson's Auto Sales
(hereafter collectively referred to as "Plaintiffs") own a parcel of property at 306 21st St.

in Lewiston, Idaho, on which Thompson's Auto Sales sells used automobiles and other vehicles. The property is located toward the bottom of a hill which 21st Street descends from south to north. The property is bounded on the south by Idaho Street (which is at a higher elevation than Plaintiffs' property), and on the north by G Street (which is at a lower elevation than Plaintiffs' property).

In 2003, as part of a street maintenance project, the City of Lewiston replaced a valley gutter which had crossed Idaho Street at the intersection with 21st Street with a catch basin/bubble up system, due to various issues including traffic problems caused by cars slowing down to pass over the valley gutter. The bubble-up system was designed to catch runoff water as it traveled down 21st Street, allow the water to pass under Idaho Street, and bubble up into the gutter past the intersection and continue traveling in the gutters down 21st Street.

On May 19, 2006, a sudden thunderstorm precipitated a large amount of rain on the Lewiston area in a short period of time. According to Plaintiffs, runoff water traveled down 21st Street towards Plaintiff's property. Plaintiffs allege that the bubble up system was ineffective, and allowed the water to cross Idaho Street on the surface, where the water flowed down Idaho Street instead of continuing along the gutters in 21st Street. The excessive volume of the water flowed down Idaho Street, over the sidewalk and onto Plaintiff's property. The water then flowed across the Plaintiff's property and pooled in an area fronting on G Street. Plaintiffs allege that the pooling water damaged a retaining wall, which had to be torn down, and replaced with a sloped area which diminished Plaintiff's ability to display and sell cars.

II.

STATEMENT OF FACTS

In May, 2003, assistant city engineer John Watson prepared plans for the 2003 Summer Street Maintenance project for the City of Lewiston. ***Affidavit of John Watson***, ¶ 3. Included in these plans was a schematic for the installation of the bubble-up system which would be placed under Idaho Street where it intersects with 21st Street. ***Affidavit of John Watson***, ¶¶ 4-5 and Ex. A. This bubble-up system was designed to replace a valley gutter which crossed Idaho Street on the surface of that street. ***Affidavit of John Watson***, ¶ 4. The valley gutter was being replaced, among other reasons, because it was causing traffic problems. Cars had to slow down as they turned onto Idaho Street to avoid striking the pavement due to the extreme dip of the valley gutter. ***Affidavit of John Watson***, ¶ 4.

Shortly thereafter, the city prepared and sent out bid documents containing project plans and other information about the 2003 Summer Street Maintenance Project to various contractors. ***Affidavit of John Watson***, ¶ 6. Contractors who were interested in working on the project submitted their bids to the City. The bids were reviewed by Mr. Watson. ***Affidavit of John Watson***, ¶ 6. After reviewing the bids, Mr. Watson prepared a memorandum dated June 9, 2003 to the City's Purchasing Division, recommending that Poe Asphalt & Paving be given the contract for the 2004 Summer Street Maintenance Project because it was the low bidder. ***Affidavit of John Watson***, ¶ 6. Included in that memorandum was a "bid tabulation" for several of the contractors who bid on the street maintenance project. ***Affidavit of John Watson***, ¶ 6. The bid tabulation contained a table specifically identifying the items that the contractors would be responsible for purchasing and installing as part of the street maintenance project.

Affidavit of John Watson, Ex. B. Item No. 603-1, listed on that document, is described as a catch basin, two of which were required for the street maintenance project. **Affidavit of John Watson**, ¶ 7 and Ex. B. Item 605-1, also listed on the bid tabulation, is described as a twelve inch PVC storm sewer pipe. **Affidavit of John Watson**, ¶ 7 and Ex. B. Both of these item numbers correspond with the design for the bubble-up system which had been prepared by Mr. Watson. **Affidavit of John Watson**, ¶ 7.

After Mr. Watson's memorandum was submitted to the City Purchasing Division, it was forwarded to the City Clerk. **Affidavit of Kari Kuchmak**, ¶ 5. The document was then attached to the agenda for the June 9, 2003 Lewiston City Council meeting, and copies were prepared for the Council members. **Affidavit of Kari Kuchmak**, Ex. A.

On June 9, 2003, the Lewiston City Council met at 7:00 PM at Lewis and Clark State College. **Affidavit of Kari Kuchmak**, ¶ 8. Item H on the consent agenda was the 2003 Summer Street Maintenance Project. **Affidavit of Kari Kuchmak**, Ex. A. The minutes for the City Council meeting show that the 2003 Summer Street Maintenance Project was unanimously approved by the City Council. **Affidavit of Kari Kuchmak**, Ex. C.

On June 12, 2003, the City of Lewiston sent a notification to Poe Asphalt & Paving that it had been awarded the contract on the 2003 Summer Street Maintenance Project. **Affidavit of John Watson**, ¶ 9. Thereafter, on June 26, 2003, the City of Lewiston sent Poe Asphalt and Paving a Notice to Proceed with the work on the project. **Affidavit of John Watson**, ¶ 10. Poe Asphalt was to begin work on June 27, 2003, and was required to complete the work by September 15, 2003. **Affidavit of John Watson**, Ex. D.

Several years later, on May 19, 2006, a thunderstorm precipitated a significant amount of rain on the City of Lewiston. See **Complaint**, ¶ V. The waters running down 21st Street overwhelmed the catch basin and bubble-up system, crossed Idaho Street and entered onto the Plaintiffs' property. The Plaintiff alleges that the flood waters traveling across his property caused a breach in a concrete support wall on the north-west corner of Plaintiff's property. See **Complaint**, ¶ V.

III.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *I.R.C.P.* 56(c). The Court exercises free review over questions of law. *Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 213 (Idaho 2007). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 134 P.3d 641, 644 (Idaho 2006).

IV.

LEGAL DISCUSSION

The bubble-up system was installed by the City of Lewiston as part of the 2003 Summer Street Project. This was not a normal operational decision, but was a discretionary decision made by city engineers and the City Council. Further, the installation was approved in advance by the City Council in a meeting in June, 2003. Under *Idaho Code* § 6-904,

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

...

7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

There is no evidence and no allegation that the design or plan for the bubble up system at the intersection of Idaho and 21st streets was designed, constructed, or that the decision to install it was made with any malice of criminal intent. Instead, the record is clear that the drainage system at the intersection of 21st Street and Idaho Street were designed by the City Engineer that the project was approved in the discretion of the City Council as a part of the 2003 Summer Street Project. There can be no argument that the

installation of a new gutter along a city street is not covered by *I.C.* §§ 6-904(1)&(7).

There are no disputed facts which are relevant to a determination of whether these immunities apply.

A. The City of Lewiston is Immune to Liability Because the City Council Approved the Installation of the Bubble-up System in Advance.

As stated above, under Idaho Law, a city is not liable for a claim which arises out of "a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is ... approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval." *I.C.* § 6-904(7).

In this case, it is undisputed that the City Council approved the 2003 Summer Street Maintenance project. The plans for the 2003 Summer Street Maintenance Project were prepared by a city engineer, John Watson. After the plans were finished, the plans were distributed to various contractors for bids. The bids which were received were reviewed by Mr. Watson, and then submitted a Memorandum summarizing the bids to the City Purchasing Division. The City Purchasing Division, in turn forwarded Mr. Watson's memorandum and supporting information to the City Council. There is no dispute that on June 9, 2003, the City Council approved the 2003 Summer Street Maintenance Project and authorized the acceptance of the bid from Poe Asphalt. See ***Affidavit of Kari Kuchmak***, Ex. C. By doing so, the City Council expressly approved the installation of the bubble-up system under Idaho Street. Such approval falls within the language of *I.C.* § 6-904(7). Therefore, the City is not liable for Plaintiffs' claims.

It is also undisputed that the actions of the City Council occurred prior to the construction on the 2003 Summer Street Maintenance Project. In fact, after the City Council's approved the project 2003 Summer Street Project, Poe Asphalt was sent and received notice that they had been awarded the contract on June 12, 2003. ***Affidavit of***

John Watson, Ex. C. Poe Asphalt was instructed that it was not allowed to begin work on the project until June 27, 2003. **Affidavit of John Watson**, Ex. D.

Thus all of the requirements of **Idaho Code** § 6-904(7) have been satisfied. There is no allegation of malice or criminal intent in the Complaint in this matter. Further, there has been no allegation of malice or criminal intent raised by the plaintiffs' discovery. Therefore Defendant City of Lewiston is immune under **I.C.** §6-904(7) and has no liability for Plaintiffs' claims.

B. The City Council's Action to Install the Bubble-Up System was a Discretionary Decision, and Therefore the City is Immune Under Idaho Code § 6-904(1).

As stated above, **Idaho Code** § 6-904(1) provides immunity to governmental entities for any claim which is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused." As discussed below, the City's installation of the valley gutter at the intersection of Idaho Street and 21st Street is certainly a discretionary function.

The Supreme Court of Idaho has recently discussed the application of the discretionary function immunity. In **Dorea Enters. v. City of Blackfoot**, 163 P.3d 211 (Idaho 2007), a similar set of facts was at issue. Dorea Enterprises, the plaintiff, sued the City of Blackfoot when the City's sewer lines became blocked and flooded the basement of Dorea's building. **Dorea Enters.**, 163 P.3d at 213. The City claimed that they were immune from liability under the discretionary function immunity, and the District Court agreed. **Id.** In affirming the District Court's decision, the Supreme Court of

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Idaho did a detailed analysis of the discretionary function immunity. The process for determining whether the immunity applies is as follows:

The discretionary function exception applies to governmental decisions entailing planning or policy formation. ***Sterling v. Bloom***, 111 Idaho 211, 723 P.2d 755 (1986). There is a two-step process for determining the applicability of this exception. ***Ransom v. City of Garden City***, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987); ***City of Lewiston v. Lindsey***, 123 Idaho 851, 856, 853 P.2d 596, 600 (Ct. App. 1993). The first step is to examine the nature and quality of the challenged actions. *Id.* "Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be 'operational.'" ***Ransom***, 113 Idaho at 205, 743 P.2d at 73. Decisions involving a consideration of the financial, political, economic and social effects of a policy or plan will generally be planning and "discretionary." *Id.* "While greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions; ... those with the least authority may, on occasion, make planning decisions which fall within the ambit of the discretionary function exception." *Id.* at 204, 743 P.2d at 72. The second step is to examine the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government. *Id.* at 205, 743 P.2d at 73.

Dorea Enters., 163 P.3d at 214. Thus, if the City's decision was discretionary, it will be immune from liability, whereas if the decision was "operational", the City is liable if it failed to use ordinary care. *Id.*

In order to determine whether the City's decision to install the bubble-up system is discretionary or operational, the nature and quality of the decision needs to be examined. If the decision was "based on a consideration of its financial, political, economic, and social effects," then it is discretionary. ***Dorea Enters.***, 163 P.3d at 214. "The discretionary function exception generally includes 'determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.'"

City of Lewiston v. Lindsey, 123 Idaho 851, 855 (Idaho Ct. App. 1993) (quoting *Sterling v. Bloom*, 111 Idaho 211, 228-29 (1986)). However, if it was a daily, routine decision, not involving the consideration of policy factors, then the decision was operational. *Dorea Enters.*, 163 P.3d at 214.

In *Dorea*, the "department supervisor for the City's sewage treatment plant, based on his expertise and education, made the decision to continue a previously enacted policy to flush the sewer lines on an annual basis, including the line in question." *Dorea Enters.*, 163 P.3d at 215. "The City's decision to flush the sewer lines annually was not an operational, every day decision that simply carried out existing policy. Rather, in arriving at his decision to make a policy, the sewer department supervisor was taking into account budgetary constraints and social considerations." *Id.*

A similar conclusion was reached in *City of Lewiston v. Lindsey*, 123 Idaho 851 (Idaho Ct. App. 1993). In that case, the City had to obtain possession of a parcel of property in order to have a right of way for a street project. *Lindsey*, 123 Idaho at 855. When sued for negligence, the Idaho Court of Appeals held that the discretionary function immunity applied, stating:

[T]here was no established policy or regulation governing or confining the City's discretion in determining when to acquire the property. The decision when to acquire Lindsey's property was a matter which implicated various financial, political, economic and social considerations. During the time in question the City had numerous projects and responsibilities placing competing demands on its financial and human resources. The proper allocation of those resources in pursuing those projects and responsibilities implicated various financial, political, economic and social considerations, and thus was a matter within the discretion of the City. While it is true that the City had resolved to perform the street improvement project, and that the City was required to follow numerous state and federal policies and regulations in order to qualify the project for federal funding, the decisions whether, and at what pace, to pursue that process always remained entirely within the discretion of the City. This

was the type of determination "made by executives or administrators in establishing plans, specifications or schedules of operations," the type of determination expressly recognized by our Supreme Court as being within the discretionary function exception of I.C. § 6-904.

Lindsey, 123 Idaho at 855.

In this case, all of the considerations identified in the cases cited above lead toward the conclusion that the City's installation of the bubble-up system was a discretionary function. According to John Watson, the decision was made because the valley gutter which existed at that location was causing traffic problems. **Watson Affidavit**, ¶ 4. The City Counsel approved the project, and "greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions." **Ransom v. Garden City**, 113 Idaho 202, 204 (1987). The installation of the bubble-up system was not merely an every day, operational decision. It required months of planning, preparation of designs by City of Lewiston Engineers, and approval by the City Council.

There was no existing policy that was being carried out. In fact, the majority of the 2003 Street Maintenance Project consisted of repaving and chip sealing city streets. The city engineers and City Council had to exercise their discretion to add the bubble-up system as part of the project. Further, the City Counsel had to exercise their discretion to have Poe Asphalt, a local contractor, perform the installation. In making these determinations, the City was necessarily considering the financial, political, economic and social effects such installation would have upon the City, its inhabitants, and its economy.

The second step in the analysis is "to evaluate the underlying policies of the discretionary function. These policies, mentioned above, are to permit those who govern

to do so without being inhibited by the threat of liability for tortious conduct and to limit judicial re-examination of policy decisions entrusted to other branches of government."

Dorea Enters. v. City of Blackfoot, 163 P.3d 211, 215 (Idaho 2007); see also ***Ransom v. Garden City***, 113 Idaho 202, 205 (Idaho 1987). Finding that the City's decision when, where and how to install a bubble-up system would serve these policies.

When and how many financial and human resources should be allocated to perform the myriad tasks of running the City of Lewiston are basic policy decisions properly entrusted to other branches of government, and it would contravene the purpose of the discretionary function exception to allow the City's decisions on those matters to be reviewed by the judicial process.

City of Lewiston v. Lindsey, 123 Idaho 851, 855-56 (Idaho Ct. App. 1993).

The bubble-up system was not installed as part of an "operational" decision. The city engineers and City Counsel acted with discretion as did the manager for Blackfoot's sewage treatment plant in ***Dorea*** and the City of Lewiston in ***Lindsey***. Therefore Defendant City of Lewiston is immune from liability under the discretionary function immunity.

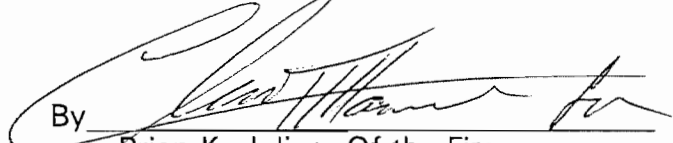
V.

CONCLUSION

Defendant City of Lewiston properly followed all of the requirements of ***Idaho Code*** § 6-904 when it installed the bubble-up system at the intersection of Idaho and 21st Streets. The City Council approved the project in early June 2003, and the work began in late June, 2003. The decision to utilize a bubble-up gutter system was a discretionary function. Thus, the City of Lewiston is immune from liability under both ***Idaho Code*** §§ 6-904(1) and (7). For these reasons, Defendant City of Lewiston requests that its Motion for Summary Judgment be granted.

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DATED this 26 day of December, 2007.

ANDERSON, JULIAN & HULL LLP


By 
Brian K. Julian, Of the Firm
Attorneys for DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26 day of December, 2007, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Brian K. Julian

2008 JAN 22 PM 3 41

PATTY O. WEEKS
CLERK OF THE DIST. COURT

~~DEPUTY~~

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I. STANDARD OF REVIEW

Summary judgment is appropriate if the motion and supporting documents show that there is no genuine issue as to any material fact, and establish that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In a summary judgment proceeding, the facts are to be liberally construed in favor of the nonmoving party. *Smith v. Idaho State Univ. Fed. Credit Union*, 103 Idaho 245, 247, 646 P.2d 1016, 1018 (Ct. App. 1982) (citing *Huyck v. Hecla Mining Co.*, 101 Idaho 299, 300, 612 P.2d 142, 143 (1980)). If reasonable persons "could reach different findings or draw conflicting inferences from the evidence, the motion should be denied." *Rausch v. Pocatello Lumber Co., Inc.*, 135 Idaho 80, 83, 14 P.3d 1074, 1077 (Ct. App. 2000) (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994)).

II. FACTS

Sometime between September of 1990 and April of 1994, the Idaho Transportation Department installed a concrete valley gutter to carry runoff storm water across Idaho Street at its intersection with 21st Street. That installation remained in place as a part of Lewiston's storm sewer system until 2003, when the City as a part of its "2003 Street Maintenance Project," removed the concrete valley gutter and replaced it with an underground water pipe. In concept, the pipe was to receive storm water from the street gutter on the west side of 21st Street through a catch basin fed by a curb inlet opening with metal gutter grate at the surface on the southwest corner of the intersection. The storm water entering the pipe would flow north across Idaho Street where it would then return to the surface and continue down the surface gutter on the west side of 21st Street.

According to the deposition testimony of John Watson, who was at the time of the 2003 Street Maintenance Project the Assistant City Engineer, the new installation was not designed to be an improvement to the City's storm sewer system. Nevertheless, Mr. Watson acknowledges it was supposed to be designed to have a functional capacity equal to that of the concrete valley gutter system it was to replace. On May 19, 2006, storm water flowing north down the west side surface gutter on 21st Street, flowed past the metal grate and the curb inlet opening leading to the underground pipe and then, following an 18% grade, flowed northwesterly across Idaho Street onto Thompson Auto Sales' car lot, breaching and undercutting a concrete retaining wall on the north side of the Thompson property and washing out a substantial portion of the car lot.

There are no detail design plans for the 2003 Street Maintenance Project. Indeed, it appears that all the plans that ever existed pertaining to the portion of the project relevant to this litigation are at CL 573 and CL 574. While the project contract plans are stamped by John Watson, a Registered Engineer, they do not qualify as engineering design plans in that they lack technical design detail sufficient to ensure an installation that would have a comparable functional capacity to the concrete valley gutter being removed. According to Roger H. Tutty, P.E., Plaintiffs' expert witness, the City's contract plans are deficient and fail to qualify as engineering design plans in that, among other things, they fail to specify sizes, limits, slope measurements and other design parameters essential to ensure the design's intended functional capacity. In addition, Mr. Tutty has determined that the concrete valley gutter, removed by the City as part of its 2003 Street Maintenance Project, would have effectively channeled the storm water north across Idaho Street and thereby avert damage to the Thompson Auto Sales' car lot

resulting from the storm water flows coming down the west side of 21st Street. Obviously, the City's installation of 2003 was not so effective.

III. ISSUES

A. Does the City's claim to governmental immunity under Idaho Code § 6-904(7) fail because no plan or design was approved in advance of construction by any legislative body or other body or agency that had such authority?

B. Does the City's claim of governmental immunity under Idaho Code § 6-904(1) fail because the City did not exercise a discretionary function when it changed the storm sewer components pursuant to its "2003 Street Maintenance Project?"

C. Whether the City is not entitled to summary judgment on Thompsons' claim that the City failed to adequately maintain the storm sewer system, because the City has offered no facts in this regard.

IV. ARGUMENTS AND AUTHORITIES

Under the Idaho Tort Claims Act it is the general rule that municipalities are liable for their negligent acts. *See Jones v. City of St. Maries*, 111 Idaho 733, 734, 727 P.2d 1161, 1162 (1986). The exceptions to the general rule of liability, including those contained within Idaho Code § 6-904, "must be closely construed." *See Id.* (quoting *Sterling v. Bloom*, 111 Idaho 211, 215, 723 P.2d 755, 759 (1986)). The burden is on the City to demonstrate that it falls squarely within the exceptions in order to be accorded immunity from its negligent actions. The City has not met its burden.

Despite its assertion to the contrary, there is no evidence that the Lewiston City Council approved a plan or design for the 2003 Street Maintenance Project, much less for the specific storm sewer work performed at the intersection of 21st Street and Idaho Street (hereinafter "Idaho Street Intersection"). Furthermore, the storm sewer changes that were made at the Idaho Street Intersection were part of an overall street maintenance project that involved corresponding curb and gutter and storm sewer maintenance. There is no evidence that somebody from the City who had the authority to do so exercised discretion to implement the storm sewer system the way it now exists at the Idaho Street Intersection. Finally, the City has not raised any facts that would support immunity on the issue of whether the City negligently failed to clean the system at the Idaho Street Intersection after the 2003 Street Maintenance Project.

A. THE LEWISTON CITY COUNCIL DID NOT APPROVE A PLAN AND DESIGN FOR THE 2003 STREET MAINTENANCE PROJECT IN ADVANCE OF CONSTRUCTION.

Idaho Code § 6-904(7) states that a governmental entity and its employees shall not be liable for a claim which:

Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

This is the design immunity provision of Idaho Code § 6-904. The City claims design immunity based upon the Lewiston City Council purportedly approving a plan or design for the 2003 Street Maintenance Project. There was never any such approval from the City Council.

The City Council's agenda for June 9, 2003, with respect to the project reads "H. BID AWARD: 2003 SUMMER STREET MAINTENANCE PROJECT AND COUNTRY CLUB DRIVE WATER MAIN REPLACEMENT: POE ASPHALT, CLARKSTON, WA: \$855,557.46." (See *Aff. of Kuchmak*, ¶3, Exh. A, CL 550). Acting City Clerk, Kari Kuchmak, states that a copy of "Bid Documents" was received by the City Clerk's office from the purchasing division on June 9, 2003, regarding the 2003 Street Maintenance Project. (See *Aff. of Kuchmak*, ¶5, Exh. B). Nowhere does the affidavit state that this information was given directly to the City Council. But even if it did, it is obvious that it is a "bid tabulation" that is being provided so that the City Council can decide which bid to accept for the project. (See *Aff. of Kuchmak*, ¶5, Exh. B, CL 562-563). The City Council was not asked to approve a plan or design for the construction of the project. It was asked to select a bid proposal for the project, which is made evident by the minutes of the City Council meeting, "H. BID AWARD: ACCEPTING THE BID PROPOSAL OF POE ASPHALT OF CLARKSTON, WASHINGTON, FOR THE 2003 STREET MAINTENANCE AND COUNTRY CLUB DRIVE WATER LINE REPLACEMENT PROJECTS IN THE AMOUNT OF \$855,557.46 AND AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT BETWEEN POE ASPHALT AND THE CITY." (See *Aff. of Kuchmak*, ¶6, Exh. C, CL 555). There is no evidence that the City Council ever saw the contract plans for the 2003 Street Maintenance Project; which begs the question, why doesn't the City claim design immunity based upon the contract plans for the 2003 Street Maintenance Project stamped by its assistant engineer, John R. Watson? (See *Aff. of Watson*, ¶3, Exh. A).

The reason why the City cannot rely upon the stamped contract plans for the project is because the storm sewer detail at the Idaho Street Intersection does not include the most critical elements of the project: what are the slope measurements and components measurements that will efficiently capture fast flowing storm water in order to make optimum use of the water pipe. The plans do not even reflect the pipe size. (*See Aff. of Watson*, ¶3, Exh. A, CL 574). The City obviously recognizes that this is the case because it continues to point to the bid tabulation sheet where there is a reference to a twelve-inch PVC storm sewer pipe. (*See Aff. of Watson*, ¶6, Exh. B, CL 547). Of course, the tabulation of various bids by contractors does not constitute a plan or design that was approved in advance of construction. The so-called plan that was approved does not contain the pipe diameter or the slope or configuration of the catch basin grate anywhere. The same is true with many other aspects of the City's alleged plan.

As stated in the expert witness report of Thompsons' engineering expert, Roger Tutty:

The design plans do not indicate any certain depths to which the pipes were to be set, nor do the plans indicate a certain size or type of pipe. Even though Lewiston's then Assistant City Engineer stamped the plans, it appears that there were in truth no plans to stamp, as the plans did not specify any sizes, limits, requirements, or other specifications that would normally be included on such design plans.

(*See Aff. and attachments, Roger H. Tutty*). This portion of Mr. Tutty's opinion is not being highlighted here to show that the City was negligent (which it was), but to show that what the City has offered in the way of a plan or design stamped by its assistant city engineer does not qualify as an engineering plan or design. It is not surprising that the City's stated plans do not constitute an engineering plan or design. The project itself is called a "maintenance" project. (*See Aff. of Watson*, ¶3, Exh. A). The City cannot now characterize the 2003 Street Maintenance

Project papers as an engineering plan or design, especially when the most critical specifications are missing from the stamped plans. An analogous situation arose in the case of *Morgan v. State*, 124 Idaho 658, 862 P.2d 1080 (1993).

In *Morgan* the plaintiff, who was totally blind, fell from a loading platform on the premises of the Lewiston State Office Building, alleging among other things, negligent design. *Id.* at 659-660, 1081-1082. The trial court found that the State was not entitled to a jury instruction on governmental design immunity, and the jury ultimately found the State to be sixty percent at fault for Morgan's injuries. *See Id.* at 661, 1083. The Idaho Supreme Court upheld the ruling of the district court on the issue of design immunity based upon the fact that the State was unable to come forward with evidence, including design plans, that showed that it did review and approve the design prior to construction. *See Id.* at 664, 1086.

Although in the instant case, the City of Lewiston can point to its 2003 Street Maintenance Project contract plans, it cannot point to anywhere in those plans where the City approved the slope of the grade and the curb measurements at the intake grate, diameter of the pipes, the type of pipes, the depth to which they were buried, and so forth. It cannot do so because, like in *Morgan*, no such plans exist. At best it can tell us that somebody, somewhere, decided on the relevant specifications because that is what is in the ground. The City is not immune from liability on the basis of design immunity under Idaho Code § 6-904(7).

B. THE CITY IS NOT ENTITLED TO GOVERNMENTAL IMMUNITY UNDER IDAHO CODE § 6-904(1) BECAUSE IT IS UNABLE TO SHOW THAT IT PERFORMED A DISCRETIONARY FUNCTION.

Idaho Code § 6-904(1) states in part that a governmental entity is not liable for a claim which is "based upon the exercise or performance or the failure to exercise or perform a

discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused. [] There is a two-step process for determining the applicability of this exception.” *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, ___, 163 P.3d 211, 214 (2007). “The first step is to examine the nature and quality of the challenged actions. *Id.* ‘Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be “operational.”’ *Ransom*, 113 Idaho at 205, 743 P.2d at 73. Decisions involving a consideration of the financial, political, economic and social effects of a policy or plan will generally be planning and ‘discretionary.’” *Dorea*, 144 Idaho at ___, 163 P.3d at 214. “The second step is to examine the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government.” *Id.* With respect to the first step, the City contends that its decision to replace approximately one hundred feet of valley gutter with a pipe with two catch basins on each side, was a discretionary function entailing, in the words of *Dorea*, “planning or policy formation.” *Id.* The cases that the City cites in support of its argument are readily distinguishable from the facts of this case.

In *Dorea*, the City of Blackfoot enacted a city-wide policy approved by the department supervisor for the city’s sewage treatment plant, that it would flush its sewer lines once every year, even though it was only legally required to flush the sewer lines once every two years. 144 Idaho at ___, 163 P.3d at 215. In *Lindsey v. City of Lewiston*, 123 Idaho 851, 852, 853 P.2d 596, 597 (1993), the Lewiston City Council passed a resolution to initiate a federally funded street improvement project that involved acquiring part of plaintiff Lindsey’s property for a right-of-

way. In the instant case, we have an assistant city engineer who as part of a "street maintenance project" changed approximately one hundred feet of the valley gutter system with one hundred feet of storm sewer pipe with catch basins.

The policy decision offered by the City is that "[t]he valley gutter was being replaced, among other reasons, because it was causing traffic problems. Cars had to slow down as they turned onto Idaho Street to avoid striking the pavement due to the extreme dip of the valley gutter." (*See Aff. of Watson*, ¶4). The City half-heartedly contends that the Lewiston City Council somehow approved the change to this approximate 100-foot stretch of storm sewer system by once again pointing to the bid tabulation sheet that was provided to the City Council before it approved Poe Asphalt as the successful bidder for the overall street maintenance project. (*See Aff. of Kuchmak*, ¶5, Exh. B, CL 562). A reference on a bid comparison sheet to two catch basins and a twelve-inch PVC C-900 storm sewer pipe, hardly reflects a policy decision. (*See Aff. of Watson*, ¶6, Exh. B, CL 547). There is no evidence in the materials provided by the City that the Lewiston City Council made a policy decision with regard to that portion of the storm sewer system in front of Idaho Street as part of the entire 2003 Street Maintenance Project.

Furthermore, the stated policy reason given by the City's assistant engineer for the change in the storm sewer at the Idaho Street Intersection is not what is at issue in this case. Thompsons' claim is not that a valley gutter is somehow superior to a sewer pipe system. Thompsons' claim is that the City is required to keep and maintain an adequate storm sewer system at the Idaho Street Intersection, regardless of whether it consists of a gutter or a pipe. The discretionary call at issue is not between a gutter and a pipe, it is between a system that can

adequately manage the storm water and a system that cannot, and the City cannot give a policy reason for why it installed a system that cannot.

In *Dorea*, the City's sewage treatment plant's supervisor testified that he took into account "City's resources, in both manpower and machinery and whether the policy was best suited to serve the public interest. Specifically, Guthrie, Blackfoot's department supervisor for the sewage treatment plant, considered 'money, budgets, the amount of people that [they] had, [specifically,] the amount of educated people.'" 144 at ___, 163 P.3d at 215. Likewise in *Jones v. City of St. Maries*, 111 Idaho 733, 736-737, 727 P.2d 1161, 1164-1165 (1986), the Court remanded the district court's decision on judgment on the pleadings granting discretionary immunity because the evidence did not indicate "that the city, due to budgetary constraints or other factors, made a policy decision not to inspect its water mains and fire hydrants...." *Id.* The City of Lewiston has not set forth any budgetary constraints or personnel constraints that would explain why it installed an ineffective gutter grate and curb inlet. Indeed, there is no detail of these components in its stamped contract plans at all. There was no discretionary policy decision made with respect to these non-existent specifications. The second step in the discretionary immunity analysis, to examine the underlying policy of the discretionary function, is also not in the City's favor.

The City appeals to the reasoning on the policy element in *Lindsey* that "[w]hen and how many financial and human resources should be allocated to perform the myriad tasks of running the City of Lewiston are basic policy decisions properly entrusted to other branches of government...." 123 Idaho at 855-856, 853 P.2d at 600-601. In this case, the City has not explained how the relevant specifications missing from its contract plans were a function of how

financial and human resources should be allocated. The best that the City can do is to tell us that somebody decided to use what is now out there for some reason. There is no evidence that financial or human resources limited the City.

The fact is, this is a design immunity situation, not a discretionary immunity situation. The problem being for the City that it does not have the relevant specifications on the contract plans for its street maintenance project. It now wishes to "fill in" the missing specifications of its inadequate drawings and claim it was discretionary. At a bare minimum, the City must demonstrate that there was a discretionary policy decision made by a governmental body with authority that is consistent with the rationale underlying the discretionary immunity function. Otherwise, municipal governments are better off to leave out specifications from their design drawing and later claim that whatever in fact was done must have been an exercise of discretion. This essentially nullifies the design immunity requirements of Idaho Code § 6-904(7). The policies underlying discretionary immunity do not support a grant of immunity to the City and would conflict with the design immunity provisions of the ITCA. The City is not entitled to discretionary immunity.

C. THE CITY IS NOT ENTITLED TO SUMMARY JUDGMENT ON THOMPSONS' NEGLIGENT MAINTENANCE CLAIM BECAUSE THE CITY HAS NOT PUT FORTH ANY FACTS THAT WOULD ENTITLE THEM TO IMMUNITY FOR FAILING TO KEEP THE STORM SEWER CLEAN.

One of the Thompsons' claims in this case is that the City did not keep the storm sewer system at the Idaho Street Intersection clean, which contributed to the flooding that damaged the Thompsons' property. (*See Aff. of Tutty*, ¶4(d)). The City has not argued that it is entitled to

immunity for failure to keep the system clean and, therefore, it is not entitled to summary judgment on that claim.

V. CONCLUSION

For the above and foregoing reasons, the City is not immune from liability for its negligence under Idaho Code § 6-904. Summary judgment should be denied.

DATED this 22nd day of January, 2008.

CREASON, MOORE & DOKKEN, PLLC



Theodore O. Creason, ISB # 1563

Attorney for Plaintiffs


Tim K. Thompson and Janet M. Thompson,
and Thompson's Auto Sales, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2008, a copy of the foregoing PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was served by the method indicated below, and addressed to the following:

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☐ HAND DELIVERED
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Theodore O. Creason

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1219 Idaho Street
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(208) 743-1516
Fax: (208) 746-2231
Attorneys for Plaintiffs
ISB # 1563

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually, and THOMPSON'S AUTO
SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision in the State of Idaho,

Defendant.

)
) Case No. CV 07-00200
)
) **AFFIDAVIT OF ROGER TUTTY**
) **RE: PLAINTIFFS' RESPONSE TO**
) **DEFENDANT'S MOTION FOR**
) **SUMMARY JUDGMENT**

STATE OF IDAHO)

: ss.

County of Nez Perce)

Roger Tutty, being first duly sworn, deposes and says:

1. I am a licensed engineer in the state of Idaho and practice in Lewiston, Idaho. I
am a private consulting engineer. My practice is located at 1132 Idaho Street, Lewiston, Idaho.

**AFFIDAVIT OF ROGER TUTTY RE: PLAINTIFFS'
RESPONSE TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT - Page 1**

toc/thompson_auto/pleading/sj_aff_tutty

Creason, Moore & Dokken, PLLC
P.O. Drawer 835, Lewiston, ID 83501
(208) 743-1516; Fax: (208) 746-2231

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2. Following an occurrence on May 19, 2006, I was engaged on behalf of Thompson's Auto Sales for the purpose of surveying, measuring, analyzing and making recommendations concerning remediation of the damage to the Thompson's Auto Sales car lot and north side retaining wall resulting from severe flood damage.

3. I was also engaged to determine the cause of the flooding across the Thompson's Auto Sales property during that particular weather event.

4. After completing my surveying, measurements and analysis I have formed certain professional opinions. Most of those opinions I have testified to at deposition in the above-referenced litigation. The opinions set forth in this affidavit are consistent with the opinions I stated at my deposition, and the following are my opinions that I hold to a reasonable degree of professional certainty:

(a) The flood causing damage to the Thompson's Auto Sales car lot on May 19, 2006 was the result of a substantial volume of storm water that collected in the street gutter on the west side of 21st Street, north of 9th Avenue and south of Idaho Street. The water collected in that gutter and flowed northward down the west side gutter on 21st Street to the southwest corner of the intersection of Idaho and 21st Street. At that point the water was flowing down a 7.7% grade. Most of the volume of water flowed over the top of a metal grate which had been installed over the top of a concrete catch basin that in turn led to an underground pipe. The flood water having passed over the top of the grate continued its flow to the northwest down an 18% grade where it crossed Idaho Street and entered the property whereon the Thompson's Auto Sales lot is located. The water

entered the Thompson property primarily through curb cuts on the south side of Idaho Street. It then flowed across the Thompson's Auto Sales car lot and northward to the concrete retaining wall on the north side of the Thompson's Auto Sales car lot. The flood water then curb cut the concrete retaining wall and breached the wall itself. The concrete wall was rendered unusable. The loss of the concrete wall substantially diminished the area of the Thompson's Auto Sales car lot.

(b) In my opinion, the weather event which resulted in flood damage to the Thompson's Auto Sales car lot was the result of the failure of the catch basin to capture the water and channel it safely across Idaho Street through the underground water pipe. This failure resulted primarily from the fact that the design and/or installation of the catch basin and underground pipe failed to take into account the fact that the grate was located at the bottom of a 7.7% grade. The size and the location of the grate, as well as its configuration and the configuration as installed of the curb/grate inlet, was inappropriate and did not allow for optimal and maximum flow into the catch basin and 12 inch pipe.

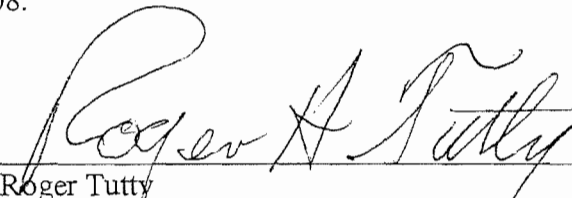
(c) Prior to the installation of the grate, catch basin and pipe, storm water collecting at the southwest corner of the intersection of Idaho and 21st Street was channeled across Idaho Street through a concrete surface valley drain where storm water would then continue in the street gutter north on 21st Street. The valley gutter system was designed and installed some time between 1990 and 1994. In my opinion, the weather event of May 19, 2006 would not have resulted in significant flood damage to the Thompson's Auto Sales car lot had the valley gutter across Idaho Street not been

removed so that the storm water could be channeled north across Idaho Street rather than following a natural course to the northwest and through the Thompson's Auto Sales car lot.

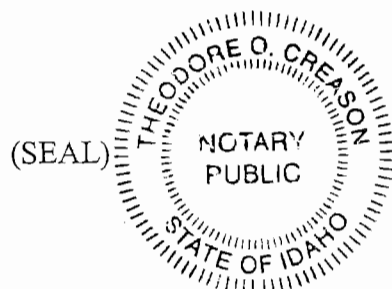
(d) I also have researched the City of Lewiston maintenance records concerning the City's maintenance of the storm sewer system in the vicinity of the intersection of Idaho and 21st Street. I find no evidence that the City maintenance crews ever flushed out the underground water pipe crossing Idaho Street. I find that this failure to flush out the underground pipe in all likelihood contributed to the flooding of the Thompson's Auto Sales car lot because the pipe itself would have had a tendency to fill up with silt and debris over time, particularly during light rain storms or light water flows coming down the surface gutter on the west side of 21st Street to the catch basin on the southwest corner of the intersection of Idaho Street and 21st Street. A build-up of silt and debris in the pipe would result in decreased flows in the pipe, particularly in the early moments of a weather event such as the May 19, 2006 rain storm.


(e) In addition to giving my deposition, in connection with this litigation I have provided an unsworn statement dated 26 October 2006 and a supplement thereto dated 9 January 2008. Those unsworn statements are attached and incorporated as a part of this affidavit.

DATED this 22nd day of January, 2008.


Roger Tutty

SUBSCRIBED AND SWORN to before me this 22nd day of January, 2008.



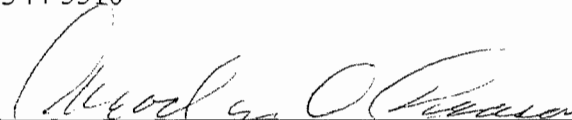

Notary Public in and for said State,
Residing at or employed in Lewiston.
My Commission Expires 09/28/2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2008, a copy of the foregoing AFFIDAVIT OF ROGER TUTTY RE: PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was served by the method indicated below, and addressed to the following:

Brian K. Julian
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Theodore O. Creason

UNSWORN STATEMENT OF ROGER TUTTY
REGARDING FLOODING INCIDENT AT
THOMPSON AUTO SALES

To Whom It May Concern:

As a licensed civil engineer I have been engaged on behalf of Tim Thompson and Thompson Auto Sales to analyze, evaluate and, if able to do so, render an opinion concerning the cause of flood damage to Mr. Thompson's commercial property located at 306 21st Street, Lewiston, Idaho, on May 19, 2006.

I was informed initially of what had occurred on Friday, May 19, 2006 on the premises of Thompson Auto Sales in Lewiston, Idaho; namely, a large storm had cause widespread flooding throughout the city and surrounding area causing particularly severe damage to the premises of Thompson Auto Sales. This damage included the crack and severe outward movement of a concrete wall on the northern edge of the premises parallel to, and bordering, G Street. I was asked to give an opinion as to why the damage occurred based upon my depth of engineering experience.

Relating to this matter, I believe that I have seen all existing documents that would be important in formulating an informed opinion. These include:

1. City of Lewiston Storm Sewer Maintenance Schedule; and
2. Initial "plans" for the construction of a connected catch basin and bubble-up located on the West side of 21st Street near Idaho Street.

I have been unable to discover additional documentation from the City of Lewiston regarding this incident or that portion of the storm sewer that has any bearing on this area.

To my knowledge, the catch basin and bubble-up were inserted to replace a valley gutter that had run north-south across the eastern end of Idaho Street where it intersects with 21st Street. The City of Lewiston had removed that valley gutter on May 7, 2003 during the "21st Street Pavement Rehabilitation." Additionally, it appears that no other storm sewer piping exists on 21st Street north of 8th Avenue, except that which pipes storm run-off from Thain road.

After examining the above records, I have determined that the City of Lewiston negligently maintained the bubble-up system on 21st Street. This bubble-up consists of a catch basin south of Idaho Street and a bubble-up mechanism north of Idaho Street. It appears that there was no regularly scheduled maintenance on the bubble-up system and that the only times it was maintained or cleaned was directly after a large storm or when

AFFIDAVIT OF ROGER TULLY RE: PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

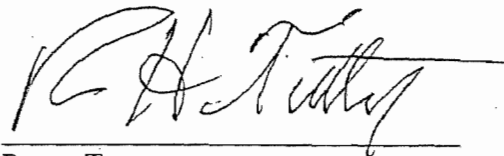
the crew happened to be in the area. In any event, the efforts at keeping the mechanism free of debris were inadequate to protect against the kind of storm that happened on May 19, 2006. In short, I believe that the City of Lewiston is following no recognized standard or informal scheduling for the upkeep and maintenance of its storm sewer facility located at the intersection of 21st Street and Idaho Street.

I have also determined that the design plans for the bubble-up were inadequate to ensure safe handling of the area's storm run-off. The design plans do not indicate any certain depths to which the pipes were to be set, nor do the plans indicate a certain size or type of pipe. Even though Lewiston's then Assistant City Engineer stamped the plans, it appears that there were in truth no plans to stamp, as the plans did not specify any sizes, limits, requirements, or other specifications that would normally be included on such design plans. Moreover, there was no apparent evaluation or appreciation of the specifications that would be required to adequately serve the storm water drainage system at the location up-gradient from Mr. Thompson's property.

The catch basin and bubble-up mentioned above were inadequate to handle the flow of water resulting from the May 19, 2006 storm. In fact, the system as installed when the surface valley drain was removed actually exacerbated the problem of collecting and transporting up-gradient storm water. It is also my opinion that the City of Lewiston failed to adequately plan the design of the catch basin and bubble-up and that had the design been well-planned, the damage to the premises of Thompson Auto Sales would have been averted. As indicated above, I also believe that inadequate maintenance of the catch basin and bubble-up contributed to the backup of water and the overflow onto the premises of Thompson Auto Sales.

26 OCTOBER 2006

Date



Roger Tutty

Licensed Engineer #1354

AFFIDAVIT OF ROGER TULLY RE: PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SUPPLEMENTAL UNSWORN STATEMENT OF
ROGER TUTTY REGARDING FLOODING
INCIDENT AT THOMPSON'S AUTO SALES

To Whom It May Concern:

The following statement reaffirms the unsworn statement given by me 26 October 2006. I reaffirm the conclusions that I set forth in the unsworn statement to a reasonable degree of engineering certainty.

Subsequent to that report I have reviewed official records of the Idaho Transportation Department showing the design plan for the storm drainage system as constructed in 1994. I have also reviewed the size and location of the existing catch basin grate up-gradient from the intersection of Idaho and 21st Streets. I have also reviewed the City of Lewiston's 2003 Street Maintenance Project identified as CL 566 - CL 576. I have analyzed and computed the capacity of the relevant storm drain system as it existed after the 1992 design was installed by the Idaho Transportation Department. I have also calculated the volume of water necessary to accommodate reasonably anticipated storm water above the storm drain on the west side of 21st Street. My review and analysis confirms my earlier conclusion that the maintenance project done by the City of Lewiston in 2003 substantially reduced the capacity of the storm drain system designed to carry storm water across Idaho Street at its intersection with 21st Street. Further, had the City not carried out the maintenance project, the storm water from the rain storm of May 19, 2006 would have been carried effectively across Idaho Street in the system in place and would not have been a threat to Thompson's Auto Sales' property. As a direct result of the City's maintenance project carried out in 2003, Thompson's Auto Sales' property sustained severe flood damage.

My calculations and analysis show to a reasonable degree of engineering certainty that the maintenance project of 2003 should have installed a catch basin on the west side of 21st Street at 8th Avenue so that storm water coming down 21st Street could have been safely and effectively carried east across 21st Street into the City's storm drain system, thus reducing the surface drain water coming down the west side of 21st Street up-gradient of the catch basin. Had the catch basin been installed, it is probable to a reasonable degree of engineering certainty that there would have been sufficient diversion of the storm water into the storm sewer so that the volume of water at the southwest corner of the intersection of Idaho and 21st Street would not have constituted a danger to the Thompson's Auto Sales property.

9 JANUARY 2008

Date



Roger Tutty

Licensed Engineer #1354

AFFIDAVIT OF ROGER TULLY RE: PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PATTY O. WEEKS
CLERK OF THE DISTRICT COURT
P. O. Weeks
DEPUTY

Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife, individually
and doing business as THOMPSON'S AUTO
SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political subdivision
of the State of Idaho,

Defendant.

Case No. CV07-00200

**DEFENDANT'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

COMES NOW Defendant City of Lewiston, by and through its attorneys of records,
Anderson Julian & Hull, LLP, and respectfully submits this brief to address and rebut the
arguments raised by the Plaintiffs response to the City's Motion for Summary Judgment.

As this Court will recall, the City of Lewiston petitioned this Court for Summary
Judgment on the grounds that Defendant is immune under *I.C.* §§ 6-904(1) and (7). Plaintiffs
have argued that these immunities do not apply because Defendant City's plan was not
adequately detailed, and therefore was not a "plan" which was approved in advance. However,
Idaho Courts have held there is no requirement as to what detail the "plan" must contain, or even

that a plan need be written down. In fact, there is no statutory requirement as to how a plan must be approved in advance. Thus, contrary to Plaintiffs' contention, the City Council's approval of the 2003 Maintenance Project is sufficient and meets the statutory requirements to establish immunity.

Additionally, the 2003 Street Maintenance Project and concurrent installation of the bubble-up system were a discretionary decision, and the policy served by the discretionary function immunity would benefit from a finding that Defendant City is immune.

I. ARGUMENT

A. Because the City Council Approved the Plan for the 2003 Street Maintenance Project in Advance of Construction, Defendant is Entitled to Immunity Under I.C. § 6-904(7).

Plaintiffs argue that the Defendant City has not met its burden to show that it is entitled to immunity under I.C. § 6-904(7). Plaintiffs have two principal arguments to support this contention: 1) because the documents submitted to the City Council were not adequately detailed, there is no "plan", and 2) because the City Council only approved the award of a bid, this is not approval of a "plan." Neither of these contentions is tenable.

The Idaho Tort Claims Act provides immunity to

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which . . . arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is . . . approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

I.C. § 6-904(7). As there is no allegation of malice or lack of authority for the City Council to approve the plan, the only issues to be resolved are whether there was a plan and whether it was approved in advance of construction. Here, it is undisputed that the Lewiston City Council approved the 2003 Maintenance Project.

The word “plan” is undefined in the Idaho Tort Claims Act. However, *Black’s Law Dictionary* defines a “plan” as “a draft, form or representation. The representation of anything drawn on a plane, as a map or chart; a scheme, a sketch. Also, a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. Method of putting into effect an intention or proposal.” *Black’s Law Dictionary*, 5th ed., “Plan”.

Neither Idaho statutory law, nor case law mandates or requires that the plan fall within some prescribed form or configuration. In fact, in *Lawton v. City of Pocatello*, 126 Idaho 454, 459 (1994), the Idaho Supreme Court expressly recognized that I.C. § 6-904(7) does not require a written plan“ (emphasis added). Obviously, if a written plan is not required, the fact that the documents were missing slopes, lengths or other information is irrelevant and does not nullify the immunity.

Other Courts have also recognized that a plan does not have to be in a specific form, format or design has been recognized in other cases. In an unpublished opinion, in *Montgomery v. Town of Los Gatos*, 2002 Cal. App. Unpub. LEXIS 9712 (California Unpublished Opinions 2002) ,the California Court of Appeals noted that “There is no requirement that either the design or the approval take any particular form.”

The reason and rationale for the flexibility in the form of the plan stems from underlying principle involving the separation of powers between the various branches of government. Several courts have addressed this issue. California law, like Idaho law, provides that a public entity is not liable for injuries caused by:

the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval ...

Cal Gov Code § 830.6. In interpreting this statute, the California courts have explained the purpose of this immunity:

[T]his defense is predicated upon the concept of separation of powers -- that is, the judicial branch through court or jury should not review the discretionary decisions of legislative or executive bodies, to avoid the danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested. Additionally, judicial economy underlies design immunity -- forbidding a jury from reweighing the same factors considered by the governmental entity which approve the design.

Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 525 (Cal. Ct. App. 1987). (internal quotation marks and citations omitted).

In this case, it is undisputed that John Watson, an employee of the City of Lewiston, prepared drawings, plans and schematics for the 2003 Street Maintenance Project. *See Watson Aff.*, ¶ 3. He further prepared blueprints and detailed sketches as to what the plan entailed. *See Watson Aff.*, Ex. "A."

Additionally, the documents provided by Kari Kuchmak and attached to her Affidavit clearly indicate that the City Council approved the plan for the 2003 Maintenance Project. Specifically, in the document attached as Exhibit B and entitled "Agenda Item-History/Commentary", the document describes and identifies scope and nature of the project as follows:

This project consists of making major repairs to certain City streets. The project will involve removal of deteriorated pavement areas, replacement with new, patching and overlay/chip seal; valve box and manhole cover adjustments and other related rehabilitation work. Three add alternates are also part of this project. Add Alternate # A – seal coat of 21st street from G Street to Shopko intersection; Add Alternate #B – seal coat of Thaine Road from 10th Street to 147' south of Cedar Avenue, Add Alternate #D – replace existing water main on Country Club drive with 1,477 linear feet of 8" class 900 PVC pipe.

Affidavit of Kari Kuckmak, Exhibit B, doc - CL558.

Thus, contrary to the claim of the Plaintiffs, there was a written plan and that plan was approved by the Lewiston City Council. Again, it is undisputed that the City Council approved a plan to provide and upgrade the City streets as a part of the 2003 Street Maintenance Project.

Such a plan was described and approved by the City Council. It is also undisputed that the City Council's approval was prior to the commencement of construction for the 2003 Street Maintenance Project.

Plaintiffs argue that the documents submitted to the City Council do not constitute a plan because such documents do not contain certain elements, such as "slope measurements and components measurements that will efficiently capture fast flowing storm water in order to make optimum use of the water pipe," or pipe size. *Plaintiffs' Response to Defendant's Motion for Summary Judgment*, p. 7 (hereinafter cited as "Plaintiffs' Response"). In essence, Plaintiffs argue that the City Council only approved the bid authorization and thus did not approve of the plans. As noted above, such an argument is contrary to the express terms of the Agenda, History /Commentary. Further, since Idaho law does not require a plan to be in writing, such an argument is not supported by Idaho law:

Very simply, Plaintiffs are attempting to engraft additional requirements onto *I.C.* § 6-904(7) which the plain text of the statute does not require. Under Plaintiffs' proposal, no governmental entity would be entitled to immunity under this section unless a legislative body specially met in advance of construction and specifically approved each and every detail of each and every drawing, blueprint, schematic or specification. Contrary to the Plaintiffs' claim, *I.C.* § 6-904(7) contains no such requirement. All that is required is that the legislative body approve of the plan. (and that plan may or may not be in writing.) Here, the project and/or the plan consisted of making major repairs to certain City Streets. In this case, such plans included the replacement of the valley gutter with a bubble up gutter system.

The Idaho Supreme Court has stated that "under *I.C.* § 6-904(7) as amended, the City was required to establish (1) the existence of a plan or design that was (2) either prepared in substantial conformance with existing engineering or design standards or approved in advance of

construction by the legislative or administrative authority.” *Lawton v. City of Pocatello*, 126 Idaho 454, 459 (1994).

Accordingly, the Lewiston City Council’s approval of the 2003 Maintenance Project and the funding for that plan clearly meet the statutory requirements. Thus, contrary to Plaintiffs’ claim, the alleged deficiencies are insufficient to prevent the 2003 Street Maintenance Project from constituting a plan and the provisions of I.C. § 6-904(7) are applicable and the City of Lewiston is immune from the plaintiffs claims.

The next issue is whether such “plan” was approved in advance of construction. Plaintiffs essentially argue that there was no approval of the plan by the Lewiston City Council because “there is no evidence that the City Council ever saw the contract plans for the 2003 Street Maintenance Project.” *Plaintiffs’ Response*, p. 6.

Again, Idaho law. I.C. § 6-904(7) does not establish what form the approval must take. As noted above, in *Lawton v City of Pocatello, supra*, a plan does not have to be in writing. It is logical to assume that if a plan does not have to be in writing, then Idaho does not require the governmental body to review and approve each and every detail, contract, subcontract, blue print, sketch, schematic and specification in advance of construction.

In this case, however, it is undisputed that the Lewiston City Council reviewed and approved the bid documents, which contained a description of the proposed construction. Such approval falls within the requirements of I.C. § 6-904(7). Thus, Plaintiffs’ arguments are without merit and the City’s Motion for Summary Judgment should be granted.

B. Because the Decision to Install the Bubble-up System was a Discretionary Decision, Defendant City of Lewiston is Entitled to Summary Judgment Under I.C. § 6-904(1).

The City also moved for summary judgment on the grounds that it is entitled to summary

judgment because the decision to install the bubble-up system was a discretionary decision under I.C. § 6-904(1). The City would note that it is significant that discretionary immunity and design immunity are not necessarily mutually exclusive. In this situation, both discretionary immunity and design immunity are applicable.

Here, the Plaintiffs argue that "this is a design immunity situation, not a discretionary immunity situation." *Plaintiffs' Response*, p. 12. Significantly, the Plaintiffs have failed to identify any case law which holds or provides that discretionary function and design function cannot apply simultaneously. The Idaho statute does not indicate that only one of the immunities may be applicable in a given situation. Further, the Idaho Rules of Civil Procedure authorize a party to plead alternative causes of action or alternatives defenses. Thus, the City's claim of protection under I.C. § 6-904(7), does not preclude it from seeking protection under the discretionary function immunity of I.C. § 6-904(1)..

Although, the facts in this case are not identical to the facts in *Dorea Enters. v. City of Blackfoot*, 163 P.3d 211 (2007) and *City of Lewiston v. Lindsey*, 123 Idaho 851 (Idaho Ct. App. 1993), *see Plaintiffs' Response*, pp. 9-10, these cases provide instructive guidance regarding governmental immunity. Discretionary immunity applies to governmental decisions involving either planning or policy formulation. *See Sterling v. Bloom*, 111 Idaho 211, 229-30 (1986). The first step in determining whether the discretionary function immunity applies is the nature of the challenged actions. *Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 214 (2007). Plaintiffs argue that the decision to install the bubble-up system was not discretionary. What Plaintiffs fail to appreciate is that the bubble-up system was not an individual decision, but was part of a larger project which involved repairing a large number of city streets. *See Watson Aff.*, ¶¶ 3-4. In general, the decision concerning how often, the frequency and the method and manner of

maintenance is a discretionary decision for which immunity is applicable. *See, e.g., Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 214 (2007).

Similarly, decisions concerning traffic patterns, changes in traffic patterns are also discretionary decisions. *See Chandler Supply Co. v. Boise*, 104 Idaho 480, 489 (Idaho 1983) (Donaldson, J., dissenting)(overruled on other grounds, *see Sterling v. Bloom*, 111 Idaho 211 (Idaho 1986)); *Waincott v. State*, 642 P.2d 1355, 1357 (Alaska 1982); *Bowers v. City of Cuyahoga Falls*, 1997 Ohio App. LEXIS 4115 (Ohio Ct. App. 1997); *Hoy v. Capelli*, 48 N.J. 81, 91 (N.J. 1966) (a governmental determination to install or not to install traffic control devices cannot ground a cause of action.) As John Watson stated, the decision to replace the valley gutter was made partially because of the traffic problems it was causing. *See Watson Aff.*, ¶ 4. Thus, regardless of whether the installation of the bubble up system is considered part of a traffic decision or a maintenance decision, either way, it is a discretionary decision to which immunity is applicable.

Additionally, the City had to consider the “financial, political, economic and social effects” that the 2003 Street Maintenance Project would have on the city and its inhabitants. “The discretionary function exception generally includes determinations made by executives or administrators in establishing plans Where there is room for policy judgment and decision there is discretion.” *City of Lewiston v. Lindsey*, 123 Idaho 851, 855 (Idaho Ct. App. 1993). Decisions regarding the plans were made on multiple levels, from the engineers to the City Council. Thus, there is substantial room for policy judgment effecting decision making.

Plaintiffs attempt to dismiss this by arguing that “The City of Lewiston has not set forth any budgetary constraints or personnel constraints that would explain why it installed an ineffective gutter grate and curb inlet.” *Plaintiffs’ Response*, p. 11. However, these factors did not necessarily affect the Defendant’s decision. “Budgetary constraints and personnel

constraints” were the policy considerations discussed in *Dorea* and *Jones v. St. Maries*, 111 Idaho 733, 736 (1986). Such considerations are certainly not the only policy considerations that a governmental entity is allowed to make. The Idaho Supreme Court made it clear that “financial, political, economic and social effects” are considerations that qualify a decision regarding a policy or plan as discretionary. *Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 214 (2007). It should be noted that the decision made by Defendant City of Lewiston very closely resembles the discretionary decisions made in *Dorea* and *Lindsey*. In *Dorea*, the decision was when to flush out the sewer lines. *Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 215 (Idaho 2007). In *Lindsey*, the decision was when to use eminent domain to purchase certain property. *City of Lewiston v. Lindsey*, 123 Idaho 851, 855 (Idaho Ct. App. 1993).

In this case, it was a decision when/whether to install a bubble-up system under the intersection of 21st Street and Idaho Street in Lewiston, Idaho. That decision was made and approved by the City Council as part of the 2003 Street Maintenance Project. Obviously, the City Council could have rejected all or parts of the project. However, instead, the City Council approved the project, including that portion of the project which included the replacement of the valley gutter and the installation of a bubble up system. The resulting conclusion is that Defendant City’s decision was not a “routine, everyday matter not requiring evaluation of broad policy factors.” *Ransom v. Garden City*, 113 Idaho 202, 205 (Idaho 1987). Accordingly, it is apparent that the determination to approve the 2003 Maintenance Project, including the installation of the bubble-up system was a discretionary decision, and therefore is entitled to immunity.

The second step of the discretionary function analysis “is to evaluate the underlying policies of the discretionary function. These policies . . . are to permit those who govern to do so without being inhibited by the threat of liability for tortious conduct and to limit judicial re-

examination of policy decisions entrusted to other branches of government.” *Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 215 (Idaho 2007). Plaintiffs misconstrue Defendant City’s argument about this requirement. Contrary to Plaintiffs contention, see *Plaintiffs’ Response*, p. 12, *Lindsey* does not create a requirement that Defendant City must show how financial and human resources should be allocated. See *City of Lewiston v. Lindsey*, 123 Idaho 851, 855-56 (Idaho Ct. App. 1993). What the *Lindsey* decision establishes is that the discretionary function exception is in place to prevent judicial process from second guessing decisions, including those about financial and human resources, made by other branches of government. In this case, Defendant City of Lewiston made the discretionary decision to proceed with the plan for the 2003 Street Maintenance Project, which included the installation of the bubble-up system.

In making this decision, Defendant City considered traffic issues, costs, personnel resources, and a multitude of other issues. As in *Lindsey* and *Dorea*, an application of the discretionary function immunity would reinforce the policy of preventing judicial re-examination of duties entrusted to other branches of government. *Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 215 (Idaho 2007).

C. Plaintiffs’ Negligence Claim Turns on the Resolution of Whether the Defendant City was Negligent in the Installation of the Bubble-Up System.

Plaintiffs argue that “One of the Thompsons’ claims in this case is that the City did not keep the storm sewer system at the Idaho Street Intersection clean, which contributed to the flooding that damaged the Thompsons’ property.” *Plaintiffs’ Response*, p. 12. While Plaintiffs’ Complaint does have a vague reference to Defendant City’s failure to maintain the bubble-up system, there is no evidence that the flooding that occurred in May 2006 was the result of the failure to maintain the system

Significantly, to date, the Plaintiffs have not provided any evidence or information that the flooding which occurred was the result of debris or blockage of the storm drain system, in

DEFENDANT’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 10

particular, the bubble up system. Absent such evidence, any claim of inadequate maintenance is ill founded and should be dismissed.

The only evidence that the Plaintiffs have provided is the unsupported opinion of Roger Tutty that the frequency of maintenance was inadequate. Mr. Tutty's Affidavit indicates that he reviewed the records of the City of Lewiston which identify and describe the maintenance conducted, but that he could not determine when, where and on what dates such maintenance was conducted. First, such evidence makes it clear that the City of Lewiston does perform maintenance on its street drainage system. However, the plaintiff has not produced, provided or identified any standards which would indicate that the frequency of maintenance utilized by the City was inadequate. Clearly under Idaho law, the frequency of conducting maintenance falls within the discretionary function discussed above. *See, e.g., Dorea Enters. v. City of Blackfoot*, 163 P.3d 211, 214 (2007).

Recently, the Defendant received a **rough draft** of the transcript of Mr. Tutty's deposition. In that deposition, Mr. Tutty testified :

Q. Okay. And what is your understanding as to what maintenance program, if any, that the City has for its storm gutter system?

A. Well, I looked -- the City gave me a copy of its maintenance reports, and it's difficult sometimes for me to draw conclusions as to what they were doing, where they were doing it, what date it was being done, and that data is not consistently recorded. But I would say what the City does do is probably drop an -- it's sort of like a shop vac type of arrangement. Except it's a big shop vac, and it's mounted on a truck and it's got maybe an eight-inch suction -- flexible suction pipe. Lift off the grate, drop it into the basin, turn on the vacuum, suck everything thing out of the bottom of the basin, turn it off, pull it out, put the grate back on.

Q. All right. And do you have any understanding as to how often that occurs?

A. That's the problem I found with the records. I couldn't tell from the records they gave me. I couldn't tell really where they are exactly working. There's conflicts between activity dates, location, points, geographic location data. I don't think there's any time of day or anything like that. But it is very inconsistent. So I can't -- I don't think I can answer that question any more directly.

Q. All right. Yesterday the deposition of Mr. Keith Bingman was taken. Do you know Mr. Bingman?

A. I don't know that I have met him, no.

Q. Okay. Did you as a part of your investigation talk with anybody at the City of Lewiston with their maintenance schedule other than getting the records for the storm drain system?

A. No. I have not done that.

(Deposition of Roger Tutty, p. 36, LL. 24- 25, p. 38, LL. 1 - 25, p. 39, LL. 1 - 7).

Accordingly, by his own admission, Mr. Tutty did not ask or inquire about the maintenance schedule. Thus, without that information, any criticism of an unknown schedule is inappropriate and unwarranted. Similarly, Mr. Tutty did not identify any appropriate standards concerning the frequency of maintenance. Mr. Tutty stated:

Q. In your analysis or were you able to find a standard or level of maintenance that you do believe is adequate?

A. Standards are difficult to impose. I came across kind of newsletter type article that is put out by the local highway maintenance people in Boise that they send out stuff. They offered all sorts of advice on how to keep leaves out of the drain systems. Their argument was it cost sixty-eight dollars per curb mile to sweep the streets free of leaves, and it cost an awful lot more to clean these catch basins. But I guess that's the only additional information I have.

(Deposition of Roger Tutty, p. 39, LL. 24 - 25, p. 40, LL. 1 - 10).

Idaho law is clear that before an expert opinion can be utilized in a motion for summary judgment, all of the foundation requirements necessary to establish the appropriate foundation at

trial are required. See *Bromley v. Garey*, 132 Idaho 807, 811 (Idaho 1999). Idaho law requires an expert to base his opinions on scientific principles and not mere suppositions. *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 592 (Idaho 2003). See also *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993). Without appropriate foundation, expert testimony is not admissible expert testimony.


In this case, Mr. Tutty's opinions concerning the frequency of maintenance are insufficient and lack foundation. Thus, such an opinion is not admissible and should not be considered by this Court.

CONCLUSION

Plaintiffs cannot avoid Summary Judgment by engrafting requirements to I.C. §§ 6-904(1) and (7) which are more stringent and which are not contained in the statute. The City has met its burden showing that there was a plan for the 2003 Street Maintenance Project, and that the City Council approved that plan. Further, the City Council and John Watson exercised discretion in making that plan. Therefore, Defendant City of Lewiston is entitled to design and discretionary function immunity. Further, that immunity covers all of Plaintiffs' claims, as those claims all revolve around the installation and maintenance of the bubble-up system.

DATED this 20th day of January, 2008.

ANDERSON, JULIAN & HULL LLP

By 

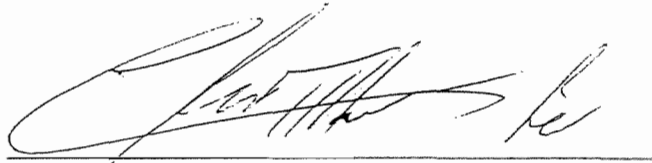
Brian K. Julian, Of the Firm
Attorneys for DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of January, 2008, I served a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
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Brian K. Julian

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PATTY D. WEEKS
CLERK OF THE DIST. COURT

P. D. Weeks
DEPUTY

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Amy G. White – ISB No. 5019
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Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually and doing business as
THOMPSON'S AUTO SALES, INC., an
Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision of the State of Idaho,

Defendant.

Case No. CV07-00200

AFFIDAVIT OF CHRIS H. HANSEN

STATE OF IDAHO)

) ss:

County of Ada)

CHRIS H. HANSEN , having been first duly sworn upon oath, deposes and
says:

1. That the statements contained herein are made of your Affiant's own personal knowledge and are true and correct to the best of his information.

2. That your Affiant is one of the attorneys for the Defendant in the above-entitled matter and as such is familiar with the facts and circumstances surrounding this matter.

3. That attached hereto are portions of a rough draft transcript of the Deposition of Roger Tutty that was taken on January 16, 2008.

4. To your Affiant's knowledge, Mr. Tutty has not yet had an opportunity to review this transcript.

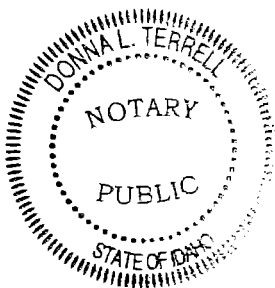
5. A copy of pages 1, 37, 38, 39 and 40 of the rough draft of Mr. Tutty's deposition is attached hereto as Exhibit "A".

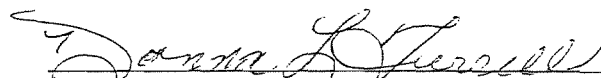
FURTHER your Affiant saith naught.



Chris H. Hansen

SUBSCRIBED AND SWORN to before me this 29 day of January, 2008.



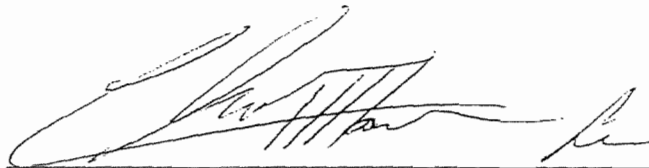

Notary Public for Idaho
Residing at: Boise, Idaho
My Commission Expires: 4-28-2011

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of January, 2008, I served a true and correct copy of the foregoing **AFFIDAVIT OF CHRIS H. HANSEN** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
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Brian K. Julian

Thereupon,

ROGER TUTTY,

a witness of lawful age, having first been duly sworn upon his oath to tell the truth, the whole truth and nothing but the truth, testified as follows:

MR. HANSEN: Let the record reflect that this is the time and place for the taking of the deposition of Roger Tutty.

MR. TUTTY: Yep.

MR. HANSEN: This deposition is being taken pursuant to notice and pursuant to the eIdaho Rules of Civil Procedure.

Mr. Tutty, as I introduced myself earlier, my name is Chris Hansen. I'm hear representing the City Of Lewiston in a case called Tim K. Thompson and his wife and Thompson's Auto Sales versus the City pf Lewiston.

It's my understanding that you have been hired as an expert in this matter. Have you ever had your taken before?

MR. TUTTY: Yes, uh-huh.

MR. HANSEN: Let we just remind you of the ground rules really quick. It's important to say yes or no as opposed to uh-huh or huh-uh so the court



1 Q. I don't want to see those. Maybe you can
2 those out or something and produce your diary with all
3 the things you have got noted in your diary for this
4 case.
5 A. And over what time period do you want?
6 Q. From the time you first got there till today.
7 A. Okay. All right.
8 Q. All right. When you conducted your
9 inspections and you saw some leaf debris on the grates
10 and that, how could you tell -- well, let me back up.
11 When you saw the leaf debris during your inspection,
12 were you able to determine whether that leaf debris was
13 there before the flood on May 19th or was it part of
14 the flood on May 19th or did you know?
15 A. Okay. In answer, the leaf debris I observed
16 was not on the grates.
17 Q. Okay. I misunderstood you.
18 A. The leaf debris I saw was below the top of the
19 grate.
20 Q. In the catch basin below?
21 A. Yes. But it's up at the lower surface of the
22 grate. It obviously entered the inlet, and then came
23 up to the surface. That's its characteristic pattern
24 particularly on the grate on the north end. On the
25 northwest -- at the northwest corner of the

1 intersection of Idaho and Twenty-First.
2 Q. And I --
3 A. And you can walk by there most anytime and you
4 will see leaf debris underneath the grate on both
5 grates.
6 Q. And when you did your inspection, and I may
7 have misunderstood, this leaf debris, did you measure
8 the depth of it or did it completely fill the catch
9 basin?
10 A. Oh, I've poked a probe in there once or twice,
11 and I would say it probably on the average it's
12 probably an inch thick. Sometimes it's two inches
13 thick.
14 Q. Okay. And these catch basins, how deep are
15 they?
16 A. Well, the -- I would say that probably the one
17 at the northwest corner of the intersection is probably
18 maybe four foot deep, maybe five foot deep.
19 Q. Okay. I think the one up at the -- on the
20 southwest corner of the intersection is not as deep.
21 Q. Okay. And we are going to take these one at a
22 time. For the pipe on the southwest corner, the one
23 that is not as deep --
24 A. Uh-huh.
25 Q. Three feet, is that about right?

1 A. I think it's a little deeper than three feet.
2 Q. Okay.
3 A. I've got this -- I've got a piece of rebar
4 that I just (indicating), and the rebar is about five
5 foot high.
6 Q. Okay.
7 A. Five foot long.
8 Q. And as I understand these catch basins, what
9 they are is effectively a concrete box with an outlet
10 at least on the southwest corner?
11 A. Uh-huh.
12 Q. That's up off the bottom a little bit; is that
13 correct?
14 A. Yes.
15 Q. Was the leaf level above or below this water
16 outlet pipe?
17 A. Well, it depends on -- I've visited the catch
18 basin quite a few times during the last year.
19 Q. Okay.
20 A. And it depends -- you know, it varies.
21 Sometimes the leaf level and the outlet, the whole
22 outlet is exposed to view, the entire depth of the
23 outlet. Sometimes the leaf level is sitting up there a
24 third of the way or half of the way up the diameter of
25 the pipe, the outlet pipe. I have seen on occasion

1 leaf material that's trying to get into through the
2 grate. You know, it hasn't made it yet, but probably
3 some came down through the end of a run-off period and
4 there was no additional water to push it in.
5 Q. And since you visited at least the southwest
6 grate on a number of occasions, my impression is that
7 the level or the amount of debris that you're seeing in
8 the catch basin seems to change?
9 A. Uh-huh, yeah.
10 Q. Is that correct?
11 A. Yes.
12 Q. Could that change be caused by maintenance
13 being conducted by the City?
14 MR. CREASON: Object to the form, calls for
15 speculation, but you can answer if you can.
16 A. Well, I think to be specific in terms of an
17 opinion.
18 Q. Sure.
19 A. I don't think the level of leaf debris is the
20 result of maintenance by the City.
21 Q. Okay.
22 A. I think the level of leaf debris is a result
23 of the lack of maintenance by the City.
24 Q. Okay. And what is your understanding as to
25 what maintenance program, if any, that the City has for

1 its storm gutter system?

2 A. Well, I looked -- the City gave me a copy of
3 its maintenance reports, and it's difficult sometimes
4 for me to draw conclusions as to what they were doing,
5 where they were doing it, what date it was being done,
6 and that data is not consistently recorded. But I
7 would say what the City does do is probably drop an --
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10 and it's got maybe an eight-inch suction -- flexible
11 suction pipe. Lift off the grate, drop it into the
12 basin, turn on the vacuum, suck everything thing out
13 of the bottom of the basin, turn it off, pull it out,
14 put the grate back on.

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16 as to how often that occurs?

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18 I couldn't tell from the records they gave me. I
19 couldn't tell really where they are exactly working.
20 There's conflicts between activity dates, location,
21 points, geographic location data. I don't think
22 there's any time of day or anything like that. But it
23 is very inconsistent. So I can't -- I don't think I
24 can answer that question any more directly.

25 Q. All right. Yesterday the deposition of

1 adequate?

2 A. Standards are difficult to impose. I came
3 across kind of newsletter type article that is put out
4 by the local highway maintenance people in Boise that
5 they send out stuff. They offered all sorts of advice
6 on how to keep leaves out of the drain systems. There
7 argument was it cost sixty-eight dollars per curb mile
8 to sweep the streets free of leaves, and it cost an
9 awful lot more to clean these catch basins. But I
10 guess that's the only additional information I have.

11 Q. All right. Do you have any information that
12 the water problems that were -- that occurred on May
13 19, 2006, were caused by the storm drain system by
14 Twenty-First and Idaho Street being plugged up or
15 clogged by debris?

16 A. Well, I don't ever recall in the maintenance
17 schedule that I looked at or that was given to me to
18 look at that, I had any reference to the cleaning of
19 the pipe itself. They talk about catch basin, but
20 there was never any mention of any hydraulic flushing
21 of the line or what we call jet cleaning of the line or
22 anything like that. That is -- that is a common
23 practice in the City of Lewiston for the sanitary sewer
24 system because sanitary sewers carry debris. And often
25 as not, the flow rate doesn't remove that debris,

1 Mr. Keith Bingman was taken. Do you know Mr. Bingman?

2 A. I don't know that I have met him, no.

3 Q. Okay. Did you as a part of your investigation
4 talk with anybody at the City of Lewiston with their
5 maintenance schedule other than getting the records for
6 the storm drain system?

7 A. No. I have not done that.

8 Q. Okay. If I represent to you that Mr. Bingman
9 testified yesterday that their basic schedule is they
10 clean certain specific areas annually, the more
11 problematic areas. And the other areas they try to get
12 to every two to three years. Using that assumption, do
13 you think that maintenance schedule is adequate or
14 inadequate?

15 MR. CREASON: I'll object to the form, but you
16 can answer that if you can.

17 MR. HANSEN: Yeah.

18 A. Well, I would I guess I can say this in
19 response, hindsight is twenty/twenty. Based on
20 observations that I've made of the kind of the local
21 drainage basin, it appears to be feeding water to the
22 two inlets. I certainly wouldn't consider the level of
23 maintenance that you describe as being adequate.

24 Q. In your analysis or were you able to find a
25 standard or level of maintenance that you do believe is

1 and.... there's always -- there's always debris going
2 into a storm water sewer. You can't escape that. And
3 in this particular instance, if you visualize this, you
4 have got at the northwest inlet you always have
5 standing water at the top of the grate level in that
6 basin. And that standing water backs water up the
7 pipe. And I did a real rough kind of mental
8 calculation and reached the conclusion that the pipe is
9 -- probably the water backs up in the pipe running
10 south from the northwest inlet about thirty feet. So
11 in effect what you have got is a pipe that's full of
12 water, static water head, at about the middle of the
13 Idaho Street intersection. Well, if a car drives by
14 and splashes water in the upper inlet then there's some
15 dirt or sand or leaf or anything else that's there,
16 that stuff is going to go down and it's going to stop
17 where the standing water in the pipe is. The
18 sediments, the suspended solids are going to settle
19 out. The floating solids are going to be backed up.
20 Nothing is going to move. I mean you get some water.
21 You know, if you have a cup full of water that goes
22 into that pipe that water is going to be a cup full of
23 water that escapes provided that there's no blockage to
24 that path as a result of debris, leaf debris. You
25 would be surprised what comes down that storm sewer.

FILED
2008 MAR 20 AM 11 29
PATTI C. WEEKS
CLERK OF THE DIST. COURT
DEPUTY
[Signature]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually and doing business as
THOMPSON'S AUTO SALE, INC., an
Idaho corporation,

Plaintiffs,

v.

CITY OF LEWISTON, a political
subdivision of the State of Idaho,

Defendant.

CASE NO. CV 07-0200

MEMORANDUM OPINION
AND ORDER ON MOTION
FOR SUMMARY JUDGMENT

This matter came before the Court on Defendant City of Lewiston's Motion for Summary Judgment. The Plaintiffs were represented by Theodore Creason, of the firm Creason, Moore & Dokken. The Defendant was represented by Chris Hansen, of the firm Anderson, Julian & Hull. The Court heard oral argument on this matter on February 8, 2008. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

BACKGROUND

Tim and Janet Thompson own and operate a car sales business, Thompson's Auto Sales, Inc., (collectively "Thompson") which is located at 306 21st Street in Lewiston, Idaho. *Complaint*, at 2. The car lot is at the bottom of a steep hill. A rainstorm which produced a significant amount of precipitation occurred in Lewiston, Idaho, on May 19, 2006. *Complaint*, at 3. Flooding waters breached the storm drain system which is parallel to 21st Street and runs across Idaho Street, the streets which bound the Thompson property on the south and eastern sides (hereafter Idaho Street intersection). As a result, flood waters ran across the Thompson's car lot property, and caused damage to a retaining wall located on the northwest corner of the property. *See Affidavit of Roger Tutty Re: Plaintiffs' Response to Defendant's Motion for Summary Judgment*, at 3 (hereafter *Affidavit of Roger Tutty*).

The Thompsons allege the City of Lewiston (hereafter "City") was negligent in the design, maintenance, or operation of the storm drain system, which was the proximate cause of the damage to the Thompsons' property following the May, 2006, storm. *Complaint*, at 3. In 2003, the Assistant City Engineer, John Watson, prepared plans to facilitate the replacement of a valley gutter system, originally in place at the Idaho Street intersection, with a catch basin and bubble-up system. *Affidavit of John Watson in Support of Defendant's Motion for Summary Judgment*, at 2 (hereafter *Affidavit of John Watson*). The design and replacement of the storm drain system in this intersection was completed as a portion of the City's 2003 Street Maintenance Project. *Id.* According to Watson, the valley gutter system was replaced because, in part, it was causing traffic problems. *Id.* In June, 2003, Poe Asphalt and Construction was awarded the contract to

complete the 2003 Street Maintenance Project, and the project, including the modification to the storm drain system at issue, was completed that year. *See id.*, at 3.

The City has filed the motion presently before this Court, arguing that it is immune from liability based upon two provision of the Idaho Tort Claims Act (hereafter “ITCA”). First the City argues that it is immune from liability pursuant to I.C. § 6-904(7). This section is referred to as the design immunity exception which allows immunity for governmental entities when a claim arises out of a plan or design from construction, when certain requirements are met. In the alternative, the City argues that the discretionary function immunity exception, as set forth in I.C. § 6-904(1), establishes immunity from the Plaintiffs’ claims. The discretionary function immunity exception applies to governmental decisions entailing planning or policy formation.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether summary judgment is appropriate, the court must construe the pleadings, depositions, admissions, and affidavits in a light most favorable to the nonmoving party. *Conway v. Sonntag*, 141 Idaho 144, 146, 106 P.3d 470, 472 (2005), *citing Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002).

When a motion for summary judgment is “supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings,” but must set forth “specific facts” showing a genuine issue. I.R.C.P. 56(e); *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984). A “mere scintilla” of evidence or only a “slight doubt” as to the facts is insufficient to

withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986), citing *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984); see also *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005).

Finally, the initial burden of establishing the absence of a genuine issue of material fact is on the moving party, and once this burden is met, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

ANALYSIS

The Thompsons allege the City was negligent in the design, maintenance, or operation of the storm drain system, which was the proximate cause of the damage to the Thompsons' property following the May, 2006, storm. *Complaint*, at 3. While it appears this negligence claim is phrased in the Complaint as a single cause of action, upon close scrutiny it is evident that there are two causes of action against the city: first, whether the City was negligent for the design and replacement of the storm drain system from a valley gutter system to a catch basin and bubble-up system; and second, whether the City was negligent in the maintenance or operation of the storm drain system in the years following installation.

The City relies on the ITCA to argue it is immune from the Plaintiffs' claims. The ITCA "abrogates the doctrine of sovereign immunity and renders a governmental entity liable for damages arising out of its negligent acts or omissions." *Lawton v. City of Pocatello*, 126 Idaho 454, 458, 886 P.2d 330, 334 (1994). However, the statute preserves the historical rule of immunity in certain specific situations. *Id.*

The purpose of the ITCA is to provide “much needed relief to those suffering injury from the negligence of government employees.” The ITCA is to be construed liberally, consistent with its purpose, and with a view to “attaining substantial justice.” Therefore, under the ITCA liability is the rule and immunity is the exception.

Rees v. State, Dept. of Health and Welfare, 143 Idaho 10, 19, 137 P.3d 397, 406 (2006) (internal citations omitted).

The City initially pursued summary judgment on the basis that the Plaintiffs have but one claim of negligence against the City and that summary judgment is appropriate based upon the design immunity or discretionary function immunity exceptions to liability as set forth in the ITCA. *See* I.C. § 6-904(7) and (1). As stated above, the proper course of analysis requires consideration of two distinct claims: first, whether the City is immune from liability for negligence in the design and replacement of the valley gutter with a catch basin and bubble-up system; and, second, whether the City is immune from liability for the City’s negligent maintenance or operation of the storm drainage system. Each claim, and whether there is an applicable statutory provision which creates immunity for the City, will be addressed in turn.

1. Does an immunity exception of the ITCA apply to the claim that the City negligently designed and replaced the valley gutter system with a catch basin and bubble-up system?

The City argues it is immune from liability for the Plaintiffs’ claims because either the design immunity exception or the discretionary function exception of I.C. § 6-904 are applicable to the case at hand. The City has not presented adequate facts necessary to support its argument for design immunity, however, the City’s argument for discretionary function immunity is well taken on the claim that the City was negligent in the design and replacement of the storm drain system. Because discretionary function

immunity is the basis for granting summary judgment on this issue, this analysis will be presented first.¹

- a. The Assistant City Engineer made the decision to replace the valley gutter and this decision was a discretionary function which falls under the discretionary function immunity exception of the ITCA.**

Under the ITCA, liability is the rule, and immunity is the exception to that rule. In order to establish the City is immune from liability for the design and replacement of the gutter system at issue, the City relies on the discretionary function immunity exception, as set forth in I.C. § 6-904(1). The pertinent portion of this provision states:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

I.C. § 6-904(1).

“The discretionary function exception applies to governmental decisions entailing planning or policy formation.” *Dorea Enter., Inc., v. City of Blackfoot*, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007). A two-step process is followed to determine the applicability of the exception. *Id.*

The first step is to examine the nature and quality of the challenged actions. “Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be ‘operational.’ Decisions involving a consideration of the financial, political, economic and social effects of a policy or plan will generally be planning and ‘discretionary.’”

¹ In briefing and at argument, the City first argued immunity based upon the design immunity exception of the ITCA. After extensive analysis, this Court concludes the City failed to affirmatively show that the appropriate legislative body reviewed and approved the plans for the replacement of the gutter system. It is on this basis that this opinion will focus first on the discretionary function immunity exception.

“While greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions; . . . those with the least authority may, on occasion, make planning decisions which fall within the ambit of the discretionary function exception.” The second step is to examine the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of the basic policy decisions properly entrusted to other branches of government.

Id. (internal citations omitted).

This Court must first consider whether the determination to replace the valley gutter system with a catch basin and bubble-up system was a discretionary or operational decision. “[T]he discretionary function exception generally includes ‘determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.’” *City of Lewiston v. Lindsey*, 123 Idaho 851, 855, 853 P.2d 596, 600 (Ct. App. 1993). In the case at hand, the decision to change the storm drain system was one which involved establishing a plan. *See Affidavit of John Watson*, Exhibit A. According to Mr. Watson, “As part of the Street Maintenance Project, I designed a plan for removing a three foot wide valley gutter which crossed Idaho Street at the intersections of Idaho Street and 21st Street in Lewiston, Idaho. The valley gutter was being replaced, among other reasons, because it was causing traffic problems.” *Id.* at 2. Nothing in the record suggests the implementation of the Street Maintenance Project was an operational, or everyday function, therefore, the first prong of discretionary function immunity is met.

Next, the underlying policies of discretionary function immunity must be examined. “These policies . . . are to permit those who govern to do so without being inhibited by the threat of liability for tortious conduct and to limit judicial re-examination

of policy decisions entrusted to other branches of government.” *Dorea Enter., Inc.*, 114 Idaho at 426, 163 P.3d at 215. Finding that the plan to replace the valley gutter with a bubble-up and catch basin system is a discretionary function would reinforce the policy of limiting judicial re-examination of policy decisions entrusted to other branches of government. Further, finding that the actions of the Assistant City Engineer fell under the discretionary function immunity exception also promotes the policy of permitting those who govern to do so without being inhibited by the threat of liability for tortious conduct. Therefore, the second requirement of establishing the discretionary function exception has been met.

The City, through the actions of the Assistant City Engineer, created a plan which included the replacement of the valley gutter with a bubble-up and catch basin system, and the City, through the act of granting the contract to Poe Asphalt for the completion of the 2003 Street Maintenance Project, implemented this plan. This implementation falls squarely within the discretionary function of the City and its officials. Therefore, summary judgment is granted in favor of the City on the Plaintiffs’ claim that the City acted negligently in the design and replacement of the valley gutter system with the catch basin and bubble-up system.

b. The design immunity exception is not applicable because the City did not affirmatively set forth facts which established that the appropriate legislative body approved the plan for replacing the gutter system.

The ITCA also sets forth immunity for a governmental entity if a claim arises out of a plan or design for the construction or improvement to roadways or other public property, if certain requirements are met. This provision is set forth in I.C. § 6-904(7).²

² A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

Although the City need not rely on this provision for immunity from the claim for negligence based upon the design and replacement of the gutter system, this Court finds it useful to set forth the reasons why immunity has not been established based upon this provision of the ITCA.

In order to establish immunity, the City is “required to establish (1) the existence of a plan or design that was (2) *either* prepared in substantial conformance with existing engineering or design standards *or* approved in advance of construction by the legislative or administrative authority.” *Lawton v. City of Pocatello*, 126 Idaho 454, 459, 886 P.2d 330, 335 (1994)(emphasis in original).³ Upon review of the record, it is clear that a plan to change the gutter system was created and approved by the Assistant City Engineer. *Affidavit of John Watson*, Exhibit A.⁴ Therefore, the first requirement to establish the design immunity exception has been met.

7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

I.C. § 6-904(7).

³ I.C. § 6-904(7) was amended in 1988. Prior to the amendment, this provision, which was then numbered subsection (8), required three elements be met in order to gain immunity. *Lawton*, 126 Idaho at 459, 886 P.2d at 335. “[T]he claim must have arisen from (1) a plan or design for construction or improvement; (2) prepared in substantial conformance with existing engineering or design standards; *and* (3) approved in advance of the construction by the legislative body exercising discretion to give authority for such approval.” *Id.*, citing *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 307, 805 P.2d 1223, 1231 (1991). Following the amendment, one less requirement is necessary for the governmental entity to gain immunity.

⁴ The gutter replacement plan is located within the Contract Plans for the 2003 Street Maintenance Project. *Id.*, Exhibit A. Specifically, a computerized sketch of 21st Street and Idaho Street is drawn, with a circle at the intersection stating “SEE STORM SEWER DETAIL ON SHEET 9.” *See Id.*, page CL 572. The storm sewer detail which provides more information regarding the removal of the catch basin and valley gutter and installation of sewer pipes and catch basins (the catch basin and bubble up system) is also located within the Contract Plans for the 2003 Street Maintenance Project. *See Id.*, page CL 574. There is no question of fact that a plan was in place prior to the installation of the catch basin bubble-up drain system.

Next, the City must establish that the plan in question was *either* prepared in substantial conformance with engineering or design standards *or* approved in advance of construction by the legislative or administrative authority. *Lawton*, 126 Idaho at 459, 886 P.2d at 335.⁵ The Plaintiffs argue that the City Council, as the appropriate legislative body, never granted approval of the plan for the change to the storm drain system, prior to the installation of the bubble-up and catch basin system. *See Plaintiff's Response to Defendant's Motion for Summary Judgment*, at 5-6. The Plaintiffs concede that the City did consider bid proposals for the 2003 Street Maintenance Project, but that this evidence alone is not proof that the City Council approved the storm drain modification plan.

The Plaintiffs rely on *Morgan v. State, Dept. of Public Works*, 124 Idaho 658, 664, 862 P.2d 1080, 1086 (1993), in support of their argument.⁶ In *Morgan*, the State failed to present evidence that the modification design was approved by the appropriate legislative body in advance of construction, therefore, the design immunity instruction was not given. *Id.*

⁵ While it is clear that the Contract Plans for the 2003 Street Maintenance Project were stamped by a professional engineer, the City has not made the argument that the plan was prepared in conformance with engineering or design standards, therefore, in order to meet the requirements of I.C. § 6-904(7), the City must show that the plan was approved in advance of construction by the legislative or administrative authority. *See* I.C. § 6-904(7). The record before the Court establishes that the plan in question was approved by the Assistant City Engineer on May 7, 2003. *See Affidavit of John Watson*, Exhibit A (professional engineer stamp for John Watson, dated 5/7/03, stamped on each page of the Contract Plans for the 2003 Street Maintenance Project). The Plaintiffs have not raised a question of fact as to whether the plan was created in advance of construction. The issue which remains is whether the plan was approved in advance by the legislative body which had authority to approve the plan.

⁶ In *Morgan*, the Idaho Supreme Court upheld the district court's refusal to instruct the jury on the design immunity defense. In *Morgan*, the plaintiff, a blind gentleman, fell from a loading dock while unloading merchandise for the commissary at a state office building. *Id.* at 660, 862 P.2d at 1082. One of the sides of the loading dock had a wall with an opening which allowed persons to access the loading dock and freight elevator from an adjoining parking lot, and it was through this opening that the Plaintiff fell. *Id.* At trial, the State asked for a design immunity instruction because they argued the opening in the wall was part of a 1984 modification plan. *Id.* at 664, 862 P.2d at 1086. The State supported its argument with various testimony about the 1984 modification plan, but no witness "testified that the design of the 1984 modification was approved in advance by officials of [the division of public works]." *Id.* "There was no evidence that [the Chief of the Bureau Building Services] or anyone else did in fact review and approve a design of the modification prior to construction." *Id.*

Here, the City has also failed to make the same connection. The City has shown that there was a plan for the replacement of the drainage system, but not that this plan was approved by the City Council. The City relied upon an affidavit from the City Clerk and an affidavit from the Assistant City Engineer to show that the plan was approved in advance. *See Affidavit of Kari Kuchmak in Support of Defendant's Motion for Summary Judgment; see Also Affidavit of John Watson.* However, a careful review of each affidavit establishes only that the City reviewed bids for the 2003 Street Maintenance Project. Neither affidavit affirmatively sets forth that the City Council reviewed the plan created by Assistant City Engineer John Watson. *Id.* The Plaintiffs are correct in their assertion that the bid documents presented to the City Council do not, standing alone, set forth the plan for the replacement of the gutter system. Therefore, the design immunity exception has not been established in the case at hand. However, as discussed above, discretionary function immunity does apply, therefore summary judgment is appropriately granted on the issue of whether the City was negligent in the design and replacement of the gutter system in question.

2. There are questions of fact regarding whether the City is immune from liability for the negligent maintenance or operation of the catch basin and bubble-up gutter system.

The second aspect of the Plaintiffs' claim of negligence is based upon the maintenance or operation of the storm drainage system. *See Complaint*, at 3. The question of whether the storm drainage system was negligently maintained and operated, causing flooding as a result of the May, 2006, storm, is a separate issue from whether the City is liable for the negligent design and replacement of the gutter system.

The Plaintiffs claim the City failed to keep the storm sewer system at the Idaho Street intersection clean, which contributed to the flooding that damaged the Plaintiffs' property. *See Plaintiffs' Response to Defendant's Motion for Summary Judgment*, at 12. This claim is supported by the Affidavit of Roger Tutty, which states in pertinent part:

I also have researched the City of Lewiston maintenance records concerning the City's maintenance of the storm sewer system in the vicinity of the intersection of Idaho and 21st Street. I find no evidence that the City maintenance crews ever flushed out the underground water pipe crossing Idaho Street. I find that this failure to flush out the underground pipe in all likelihood contributed to the flooding of the Thompson's Auto Sales car lot because the pipe itself would have had a tendency to fill up with silt and debris over time, particularly during light rain storms or light water flows coming down the surface gutter on the west side of 21st Street to the catch basin on the southwest corner of the intersection of Idaho Street and 21st Street. A build-up of silt and debris in the pipe would result in decreased flows in the pipe, particularly in the early moments of a weather event such as the May 19, 2006 rainstorm.

Affidavit of Roger Tutty, at 4.

The City argues that discretionary function immunity, as discussed above, should also apply to the maintenance of the storm sewer system, however, the City has not provided any evidence regarding the maintenance of the storm sewer system in conjunction with the events which led to the damage to the Thompsons' property. There is nothing in the record which sets forth any policies by the City regarding maintenance, or testimony from city employees as to how the storm gutter system is maintained.⁷ Therefore, the City has not shown it is immune as a result of a discretionary decision made by a City employee.

⁷ At argument, the City referred to excerpts from a rough draft of the transcript of the Deposition of Roger Tutty that was taken on January 16, 2008. The City argued that Mr. Tutty, as an expert, could not set forth standards which the City should have followed regarding maintenance, therefore, his testimony did not establish that the City was negligent. Regardless, the City has provided no facts whatsoever regarding the maintenance of the storm gutter system in Lewiston, therefore, based upon the record before this Court, the Plaintiffs have adequately raised a question of fact as to whether the system was negligently maintained.

The City relies on *Dorea Enter., Inc., v. City of Blackfoot* for the proposition that decisions regarding maintenance of sewer lines are immune from liability under the discretionary immunity exception of the ITCA. The City properly argues that the *Dorea* Court found that the decision made by the department supervisor for the City of Blackfoot's sewage treatment plant to flush sewer lines annually was a planning decision which was immune from liability under the ITCA's discretionary function immunity clause. 144 Idaho 422, 426, 163 P.3d 211, 215 (2007). The holding in *Dorea*, however, is dependent upon the facts of that case, and a blanket assertion cannot be made that all decisions made by governmental employees with regard to sewer systems are discretionary, as opposed to operational, decisions.

The facts in *Dorea* are clearly distinguishable from the facts in the case at hand. In *Dorea*, the department supervisor for the City of Blackfoot's sewage treatment plant (Jeff Guthrie) testified specifically to the considerations he made before electing to flush the sewer lines once a year. "Specifically, Guthrie considered 'money, budgets, the amount of people that [they] had, [specifically,] the amount of educated people.' Guthrie testified that he would have preferred to flush the line quarterly, but he simply didn't have the manpower and budget to do it." *Id.* (modifications in original).

It is feasible that the City of Lewiston, in the case at hand, may have a maintenance plan and schedule which applies to the maintenance of this storm drain system, and it is possible that decisions made regarding the maintenance of this system may fall under the discretionary immunity exception. However, there is no evidence in the record before this Court which supports this conclusion. The *Dorea* Court relied on a very clear record of policy decisions when it determined that Guthrie's decisions fell

under the discretionary function immunity exception. In doing so, the Court made a careful determination of the reasons why Guthrie's decisions were indeed discretionary decisions rather than "daily, routine decisions[s] not involving the consideration of policy factors," which are operational decisions. *Dorea Enter., Inc.*, 144 Idaho at 425, 163 P.3d at 214.

It is also possible that decisions regarding the maintenance of the gutter system at issue in the case at hand were simply operational decisions, and if so, then "the City would be subject to liability if it failed to exercise ordinary care." *Id.*, see also *Jones v. City of St. Maries*, 111 Idaho 733, 736, 727 P.2d 1161, 1164 (1986). The record currently before this Court leaves this question open, thus this Court cannot find that the discretionary immunity exception is applicable regarding the maintenance and operation of the storm drain system in question. Reviewing the facts in a manner most favorable to the non-moving party, the Thompsons, the City's motion for summary judgment regarding negligent maintenance or operation of the storm drain system must be denied.

CONCLUSION

The Plaintiffs have alleged the City was negligent in the maintenance, design, or operation of the storm drain system located at the intersection of Idaho Street and 21st Street, which lead to damage of the Plaintiffs' property following a substantial rain storm on May 19, 2006. The City argues it is immune from liability pursuant to the ITCA, specifically, under the design immunity or discretionary function immunity exceptions as set forth in I.C. § 6-904(7) and (1). In order to determine whether an immunity exception applies, it is necessary analyze two separate and distinct claims: a claim for negligent

design of the storm drain system, and a claim for negligent maintenance or operation of the storm drain system.

The decision to replace the storm drain system with a catch basin and bubble-up system, and the plan which implemented this change fall under the discretionary function immunity exception. There is no factual dispute that the City's plan and implementation of the replacement of the gutter system at the Idaho Street intersection were discretionary decisions, and therefore fall under the ambit of the discretionary function immunity exception of the ITCA.

There are questions of fact regarding whether the City is immune from liability for the negligent maintenance or operation of the storm drain system. Absent from the record are facts which describe how the City maintained and operated the gutter system in question, therefore this Court is unable to determine whether the City is immune from liability, pursuant to the ITCA, on this claim.

In conclusion, the City's motion for summary judgment is granted on the Plaintiffs' claim that the City was negligent in the design and replacement of the storm gutter system. The City's motion for summary judgment is denied on the Plaintiffs' claim that the City negligently maintained or operated the storm system.

ORDER

The Defendant City of Lewiston's Motion for Summary Judgment is hereby GRANTED in part and DENIED in part, consistent with the foregoing opinion.

IT IS SO ORDERED.

Dated this 20th day of March 2008.


CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT was:

1 hand delivered via court basket, or

1 mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this ____ day of March, 2008, to:

Theodore Creason
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PATTY O. WEEKS, CLERK

By: *[Signature]*

Deputy



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PATTY D. WEAKS
CLERK OF THE DIST. COURT

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.)	
THOMPSON, husband and wife,	)	Case No. CV 07-00200
individually, and THOMPSON'S AUTO)	
SALES, INC., an Idaho corporation,	)	PLAINTIFFS' MOTION FOR
	)	RECONSIDERATION
Plaintiffs,)	
)	
vs.)	
)	
CITY OF LEWISTON, a political)	
subdivision in the State of Idaho,)	
)	
Defendant.)	
)	
)	

COME NOW the plaintiffs, Tim K. Thompson, Janet M. Thompson, and Thompson's Auto Sales, Inc., (hereinafter "the Thompsons"), by and through their attorney of record,

Theodore O. Creason of Creason, Moore & Dokken, PLLC, and hereby submit their Motion for Reconsideration of the Court's Memorandum Opinion and Order on Motion for Summary Judgment dated March 20, 2008, as follows:

I.R.C.P. 11(a)(2)(B) reads as follows:

Motion for Reconsideration. A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

The Thompsons request reconsideration of the Court's decision granting partial summary judgment in favor of the City that it is immune from liability under the discretionary immunity provision of Idaho Code § 6-904(1) on the claim that the City acted negligently in the design and replacement of a valley gutter system with a bubble-up system at the intersection of Idaho Street and 21st Street in Lewiston, Idaho. The particular basis for the Motion for Reconsideration is that the City has not met its burden of proving that the Assistant City Engineer, John Watson, had the discretionary authority to decide to replace the valley gutter with the bubble-up system.

The Court concluded "the actions of the Assistant City Engineer fell under the discretionary function immunity exception [which] promotes the policy of permitting those who govern to do so without being inhibited by the threat of liability for tortious conduct." (Memo. and Order on MSJ, p. 8.) The Court further found "[t]he City, though the actions of the Assistant City Engineer, created a plan which included the replacement of the valley gutter with a

bubble-up and catch basin system, and the City, through the act of granting the contract to Poe Asphalt for the completion of the 2003 Street Maintenance Project, implemented this plan." *Id.* The issue that the Thompsons request the Court to re-examine is whether the City has provided facts to support a conclusion that there is no genuine issue of material fact that Assistant City Engineer, John Watson, had discretionary authority to make such a decision.

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

Idaho Code § 6-904. "[T]he discretionary function exception generally includes 'determinations made by executives or administrators in establishing plans, specifications or schedules of operations.'" *City of Lewiston v. Lindsey*, 123 Idaho 852, 855, 853 P.2d 596, 600 (Ct. App. 1993) (quoting *Sterling v. Bloom*, 111 Idaho 211, 228-29, 723 P.2d 755, 772-73 (1986)). "While greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions; ... those with the least authority may, on occasion, make planning decisions which fall within the ambit of the discretionary function exception." *Dorea Enter. v. City of Blackfoot*, 144 Idaho 422, ____, 163 P.3d 211, 214 (2007).

In a summary judgment proceeding, the facts are to be liberally construed in favor of the nonmoving party. *Smith v. Idaho State Univ. Fed. Credit Union*, 103 Idaho 245, 247, 646 P.2d 1016, 1018 (Ct. App. 1982) (citing *Huyck v. Hecla Mining Co.*, 101 Idaho 299, 300, 612 P.2d 142, 143 (1980)). If reasonable persons "could reach different findings or draw conflicting

inferences from the evidence, the motion should be denied." *Rausch v. Pocatello Lumber Co., Inc.*, 135 Idaho 80, 83, 14 P.3d 1074, 1077 (Ct. App. 2000) (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994)). The initial burden of establishing the absence of a genuine issue of material fact is on the moving party. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 175, 923 P.2d 416, 420 (1996). After reviewing the City's affidavits in support of their Motion for Summary Judgment, the Thompsons can find no facts established by affidavit that would support the proposition that the Assistant City Engineer had discretionary authority to make the decision to replace the valley gutter with a bubble-up system.

The Affidavit of John Watson states that he is an Assistant City Engineer for the City of Lewiston and that he was involved in the 2003 Street Maintenance Project and "prepared the plans necessary to complete the Street Maintenance Project." (See Aff. of Watson, ¶ 3.) He further affirms that he "designed a plan for removing a three foot wide valley gutter which crossed Idaho Street at the intersections of Idaho Street and 21st Street in Lewiston, Idaho." (See Aff. of Watson, ¶ 4.) He further states that "[t]he valley gutter was being replaced, among other reasons, because it was causing traffic problems. Cars had to slow down as they turned onto Idaho Street to avoid striking the pavement due to the extreme dip of the valley gutter." *Id.* Mr. Watson nowhere states that he had the authority to make the decision to replace the valley gutter with a bubble-up system, only that he was the one who prepared the plans.

Mr. Watson goes on to state that he reviewed bid proposals from the contractors and prepared a memorandum to the Purchasing Division of the City of Lewiston. (See Aff. of Watson, ¶ 6.) Mr. Watson then sent this memorandum to Dale Bloom, a purchasing agent for the

City of Lewiston, and later the City sent notice to Poe Asphalt & Paving that they had been awarded the contract on the project. (See Aff. of Watson, ¶¶ 8 & 9.) Finally, Mr. Watson states that "the City sent a notice to Poe Asphalt & Paving that they were to proceed on the Street Maintenance Project." (See Aff. of Watson, ¶ 10.) Far from indicating that Mr. Watson had discretionary authority to decide to replace the valley gutter with the bubble-up system, his affidavit testimony indicates that it was some other official who was required to make that determination. In fact, Mr. Watson testified that he was directed to design the bubble-up system and eliminate the valley gutter, but he cannot remember who it was who directed him to do it. (See Aff. of Creason, ¶ 2, Exh. 1, p. 28, ll. 14-25; p. 29, ll. 1-25 & p. 30, ll. 1-5.) Likewise, the City insists in its submittals in support of summary judgment that it was the City Council that made the discretionary decision to replace the valley gutter.

The City argues at page 11 of its Memorandum in Support of Motion for Summary Judgment that "[t]he installation of the bubble-up system was not merely an every day, operational decision. It required months of planning, preparation of designs by City of Lewiston Engineers, and approval by the City Council." Although there is nothing in the affidavits submitted by the City that other engineers were involved other than John Watson, the Thompsons agree that approval by the City Council would be required. Again,

In this case, it was a decision when/whether to install a bubble-up system under the intersection of 21st Street and Idaho Street in Lewiston, Idaho. That decision was made and approved by the City Council as part of the 2003 Street Maintenance Project. Obviously, the City Council could have rejected all or parts of the project. However, instead, the City Council approved the project, including that portion of the project which included the replacement of the valley gutter and the installation of the bubble-up system. The resulting conclusion is that

Defendant City's decision was not a "routine, everyday matter not requiring evaluation of broad policy factors."

(See Defendant's Reply in Support of MSJ, p. 9.) However, the Court in its ruling on summary judgment found that the City did not establish it was entitled to design immunity specifically because "[n]either affidavit affirmatively sets forth that the City Council reviewed the plan created by Assistant City Engineer John Watson." (See Memo. and Order on MSJ, p. 11.) The Thompsons admit that the City granted the contract to Poe Asphalt for the completion of the 2003 Street Maintenance Project, but the Thompsons contend that this does not establish an absence of a genuine issue of material fact as to whether the requisite city official reviewed Mr. Watson's plan and exercised discretion approving the replacement of the valley gutter with the bubble-up system.

The Thompsons in their Response to Defendant's Motion for Summary Judgment argued that the City was not entitled to discretionary immunity because there was no evidence that the City Council made a policy decision to replace the valley gutter with the bubble-up system. (See Plaintiffs' Response to MSJ, p. 10.) There are no facts set forth in the City's affidavits that Assistant City Engineer John Watson had discretionary authority to make such a decision apart from the City Council. It is the City's burden to establish the absence of a genuine issue of material fact as to Mr. Watson's authority. It is the Thompsons' belief that the City cannot demonstrate that an Assistant City Engineer has the discretionary authority to make the decision to change the design of a municipal storm sewer system.

The Affidavit of Bud R. Van Stone, Public Works Director for the City of Lewiston from 1989 through 1999, states that during his tenure, an Assistant City Engineer would not have the

discretionary authority to install or remove functioning portions of city infrastructure, which would have required the approval of the Public Works Director, the City Manager, and perhaps the City Council depending upon the situation. (See Aff. of Van Stone, ¶¶ 1, 6, 7 & 8.) Furthermore, Mr. Van Stone was the Public Works Director who made the decision to install the surface gutter at the intersection of Idaho Street and 21st Street after consulting with the City Manager. (See Aff. of Van Stone, ¶¶ 2 & 3.) After obtaining the requisite approval, the Idaho Transportation Department installed the valley gutter, which alleviated the flooding incidents that were reported at the property now owed by Thompson's Auto Sales. (See Aff. of Van Stone, ¶¶ 4 & 5.) Further evidence that an Assistant City Engineer does not have discretionary authority to decide to remove or install part of the city storm sewer infrastructure comes from those portions of Mr. Watson's deposition transcript where he shows no appreciation that he was making a discretionary decision between addressing the road condition and diminishing the capacity of the storm sewer.

Mr. Watson testified that he believed the bubble-up system would carry the same volume of water as the valley gutter. (See Aff. of Creason, ¶ 2, Exh. 1, p. 27, ll. 14-23.) Even the former Public Works Director recognized this type of system would not work to carry the necessary capacity of storm water at the intersection. (See Aff. of Van Stone, ¶ 3.) This is the same conclusion that the Thompsons' expert engineer, Roger Tutty, came to. (See Aff. of Roger Tutty filed January 22, 2008.) Mr. Watson at the time he designed the bubble-up system did not know who had designed the valley gutter, had not looked at the plans and specifications of the valley gutter system, and does not recall talking to anyone in the engineering staff that was aware of the

history of the valley gutter system. (See Aff. of Creason, ¶ 2, Exh. 1, p. 30, ll. 3-16.) Mr. Watson has no recollection of whether any calculations were done to determine the functional capacity of the bubble-up system versus the valley gutter. (See Aff. of Creason, ¶ 2, Exh. 1, p. 25, l. 25; p. 26, ll. 1-25 & p. 27, ll. 1-3.) There is no indication that Mr. Watson perceived he was making a discretionary decision between reducing the capacity of the existing storm water system in order to address the traffic problems at the intersection. The Thompsons contend that Mr. Watson was not making a discretionary decision because he did not have the authority to make such a decision.

The Thompsons request that summary judgment be denied on the issue of discretionary immunity because the City has not met its burden that the Assistant City Engineer had the requisite authority to make the decision.

CONCLUSION

The Thompsons request that the Court re-examine the evidence presented by the City for the proposition that the Assistant City Engineer, Mr. Watson, had the discretionary authority to change the valley gutter with the bubble-up system. The Thompsons respectfully contend that the City has not met its burden in establishing that no genuine issue of material fact exists on this issue. The Thompsons request that the Court grant their Motion for Reconsideration and deny entry of partial summary judgment for the City on the issue of discretionary immunity.

DATED this 3rd day of April, 2008.

CREASON, MOORE & DOKKEN, PLLC



Theodore O. Creason, ISB # 1563

Attorney for Plaintiffs

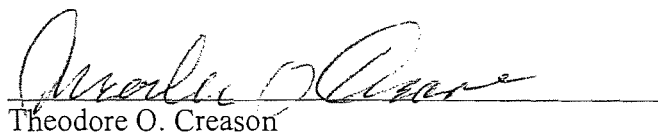
Tim K. Thompson and Janet M. Thompson,
and Thompson's Auto Sales, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April, 2008, a copy of the foregoing PLAINTIFFS' MOTION FOR RECONSIDERATION was served by the method indicated below, and addressed to the following:

Brian K. Julian
Stephen L. Adams
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 South Fifth Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426

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Theodore O. Creason

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2008 APR 3 AM 11:08

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Attorneys for Plaintiffs
ISB # 1563

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.)	
THOMPSON, husband and wife,	)	Case No. CV 07-00200
individually, and THOMPSON'S AUTO)	
SALES, INC., an Idaho corporation,	)	AFFIDAVIT OF THEODORE O.
	)	CREASON RE: PLAINTIFFS'
Plaintiffs,	)	MOTION FOR
	)	RECONSIDERATION
vs.)	
)	
CITY OF LEWISTON, a political)	
subdivision in the State of Idaho,)	
)	
Defendant.)	
)	
)	

STATE OF IDAHO)
: ss.
County of Nez Perce)


Theodore O. Creason, being first duly sworn, deposes and says:

1. I am the attorney of record for plaintiffs, Tim K. Thompson and Janet M. Thompson, husband and wife, individually, and Thompson's Auto Sales, Inc., and Idaho

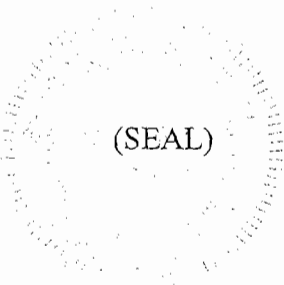
corporation, in the above matter, and as such, have personal knowledge of the matters contained herein, unless otherwise specified.

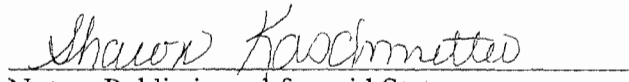
2. Attached hereto as Exhibit 1, is a true and correct copy of the relevant portions of the deposition testimony of John Watson taken on January 15, 2008.

DATED this 3rd day of April, 2008.


Theodore O. Creason, ISB # 1563

SUBSCRIBED AND SWORN to before me this 3rd day of April, 2008.





Notary Public in and for said State,
Residing at or employed in Lewiston.
My Commission Expires: 3/19/10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April, 2008, a copy of the foregoing AFFIDAVIT OF THEODORE O. CREASON RE: PLAINTIFFS' MOTION FOR RECONSIDERATION was served by the method indicated below, and addressed to the following:

Brian K. Julian
Stephen L. Adams
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Theodore O. Creason

EXHIBIT 1

AFFIDAVIT OF THEODORE O. CREASON RE: PLAINTIFFS'
MOTION FOR RECONSIDERATION

IN THE DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.)
THOMPSON, husband and wife,)
individually, and THOMPSON'S)
AUTO SALES, INC., an Idaho)
corporation,)

Case No. CV 07-00200

Plaintiffs,)

vs)

City OF LEWISTON, a political)
subdivision in the State of)
Idaho,)

Defendant.)

COPY

Taken at 1219 Idaho Street
Lewiston, Idaho
Tuesday, January 15, 2008 - 2:00 p.m.

D E P O S I T I O N
OF
JOHN ROBERT WATSON

A P P E A R A N C E S

THEODORE O. CREASON, Esq., of the law firm of Creason
Moore and Dokken, PLLC, 1219 Idaho Street, Post Office
Drawer 835, Lewiston, Idaho 83501,
appearing on behalf of the Plaintiffs.

CHRIS H. HANSEN, Esq., of the law firm of ANDERSON
JULIAN and HULL, LLP, C.W. Moore Plaza, 250 South Fifth
Street, Suite 700, Post Office Box 7426, Boise, Idaho
83707-7426,

appearing on behalf of the Defendant.

AFFIDAVIT OF THEODORE O. CREASON RE PLAINTIFFS'
MOTION FOR RECONSIDERATION

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Q. (BY MR. CREASON) Okay. Did you review your

1 file in order to determine whether or not calculations
2 were done to determine the functional capacity of the
3 pipe that -- or on your design?

4 A. No. I have not reviewed any of the City's
5 files.

6 Q. No. I mean you files.

7 MR. HANSEN: Your personal files.

8 A. I do not have any personal files other than the
9 contract plan and specifications.

10 Q. (BY MR. CREASON) Okay. So, you can say with a
11 certain degree of confidence that your file doesn't
12 contain any information that would indicate to you who,
13 if anybody, did an analysis to determine the functional
14 capacity of the pipe that was going to be used to
15 replace the valley gutter?

16 A. My personal file contained only the plans and
17 specifications and nothing else.

18 Q. So -- and you haven't looked at the City's
19 files, so you don't know for sure whether the City's
20 files would reflect that you or someone else did an
21 analysis of the functional capacity of this -- this pipe
22 to carry the stormwater from the south side of Idaho
23 Street over to the bubble up on the north side, correct?

24 A. Correct. I have not looked at those.

25 Q. Okay. Typically would you have required you or

1 somebody else to make that analysis calculation before
2 you put your engineering stamp on those plans?

3 A. Yes.
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14 Q. Now, do you -- do you have an opinion as to
15 what the functional capacity of that pipe you designed
16 there would be to carry water -- storm-drain water from
17 the south side of Idaho Street over to the bubble up on
18 the north side?

19 A. Yes.

20 Q. And what is it?

21 A. My opinion is that it is capable of handling
22 the same runoff, the same flow that the valley gutter
23 has the capacity to contain.
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14 Q. Okay. In making your design of the underground
15 pipe to replace the valley-gutter system, did you take
16 into consideration the -- the reasons for altering this
17 to replace the valley-gutter system with a bubble-up
18 system, or was that just something that was dictated to
19 you by your superiors?

20 A. I guess I don't understand what....

21 Q. Was part of your responsibility to -- to
22 satisfy a certain, that is, to -- well, I will just ask
23 it this way, did you design this bubble-up system in
24 response to direct instructions, which consisted of
25 somebody coming into your office and saying, Let's

1 replace that valley gutter with a bubble-up system, or
2 were you satisfying a particular assignment to
3 accomplish a particular change in configuration of the
4 street out there? Do you understand?

5 A. Yeah. It was initiated, like I said, by a
6 request of whomever it was, I don't remember, to
7 eliminate the valley gutter.

8 Q. Okay.

9 A. To reduce that safety problem there.

10 Q. Now, did somebody tell you it was to reduce a
11 safety problem?

12 A. Yes.

13 Q. And who was that?

14 A. I don't recall. It was probably the same
15 conversation as when we discussed --

16 Q. All right.

17 A. -- removing it.

18 Q. Did you make any evaluation of the safety
19 features or lack of safety features of a valley gutter
20 versus a bubble-up system?

21 A. Yes.

22 Q. You did?

23 A. Well, as far as a visual look, you could see
24 the oil pan skids across the asphalt right next to it.

25 Q. You actually observed them yourself?
AFFIDAVIT OF THEODORE O. CREASON RE: PLAINTIFFS'
MOTION FOR RECONSIDERATION

1 A. Yes. And I have driven that when it was there.
2 I remember that area.

3 Q. Did you document any -- any property damage or
4 safety events relative to the valley gutter?

5 A. Not that I recall.

6 Q. Do you -- do you know who designed the
7 valley-gutter system?

8 A. No.

9 Q. Did you look at the plans and specifications of
10 the valley-gutter system prior to designing the
11 bubble-up system?

12 A. No.

13 Q. Did you talk to anyone in the engineering staff
14 that was aware of the history of the valley-gutter
15 system?

16 A. Not that I can recall.
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CERTIFICATE OF WITNESS

PAGE LINE

I hereby certify that this is a true and correct copy of my testimony, together with any changes I have made on this and any subsequent pages attached hereto:

Dated this day of ,
2008.

JOHN ROBERT WATSON, DEPONENT

Sworn and Subscribed before me this
day of , 2008.

NOTARY PUBLIC FOR the STATE OF IDAHO
Residing in , Idaho
My Commission Expires:

CERTIFICATE

STATE OF IDAHO)

) SS.

County of Nez Perce)

I, GLORIA J. McDOUGALL, CSR, RPR, CP,
Freelance Court Reporter and Notary Public for the
States of Idaho, Idaho CSR No. 234; Washington,
Washington CSR No. MC-DO-UG-J51607; and Oregon, residing
in Lewiston, Idaho, do hereby certify:

That I was duly authorized to and did report
the deposition of JOHN ROBERT WATSON in the
above-entitled cause;

That the reading and signing of the
deposition by the witness have been expressly reserved.

That the foregoing pages of this deposition
constitute a true and accurate transcript of my
stenotype notes of the testimony of said witness.

I further certify that I am not an attorney
nor counsel of any of the parties; nor a relative or
employee of any attorney or counsel connected with the
action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my
hand and seal on this day of 2008.

GLORIA J. McDOUGALL, CSR, RPR, CP
Freelance Court Reporter
Notary Public, States of Idaho
Washington and Oregon
Residing in Lewiston, Idaho
My Commissions Expire: 10/06/09,
10/01/07, and 05/31/04

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AFFIDAVIT OF THEODORE O. CREASON RE: PLAINTIFFS'
MOTION FOR RECONSIDERATION

15 (Pages 54 to 55)

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2008 APR 3 AM 11 08

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Attorneys for Plaintiffs
ISB # 1563

PATTY J. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

Beth Rogers

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.)
THOMPSON, husband and wife,) Case No. CV 07-00200
individually, and THOMPSON'S AUTO)
SALES, INC., an Idaho corporation,) **AFFIDAVIT OF BUD R.**
Plaintiffs,) **VAN STONE**
vs.)
CITY OF LEWISTON, a political)
subdivision in the State of Idaho,)
Defendant.)

STATE OF IDAHO)
: ss.
County of Nez Perce)

Bud R. Van Stone, being first duly sworn, deposes and says:

1. I was the Public Works Director for the City of Lewiston from 1989 through 1999.

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2. During the ten years that I acted as Public Works Director I became aware of a problem managing storm run-off along the west side of 21st Street where it intersects with Idaho Street. In particular, during heavy rain storms in the area and to the south a substantial volume of water would collect along the west side surface gutter until it got to the southwest corner of the intersection of Idaho and 21st Street. At that point the water would flow to the northwest across Idaho Street and flood across the commercial property located at 306 21st Street.

3. Due to the frequency of the flooding, I determined it was necessary to install a swale or surface gutter across Idaho Street in order to keep the water channeled across Idaho Street and to avoid flooding the properties to the northwest. After identifying this problem and the potential solution I consulted with the City Manager, Jan Vassar, and obtained approval for the installation of a valley gutter or swale. At that time I determined that an underground pipe system was not practical since a slope of the west side gutter of 21st Street up gradient of the intersection was so steep that it would be difficult to get water from the surface gutter underground into a pipe.

4. After obtaining approval for the valley gutter from the City Manager, I approached the Idaho Transportation Department to determine if they would install a standard valley gutter as a part of the G Street intersection improvement project plan for channeling storm water across Idaho Street at the intersection with 21st Street.

5. After the installation of the swale or valley gutter by the Idaho Transportation Department there were no further flooding incidents were reported at the commercial property which is now occupied by Thompson's Auto Sales. (At the time I was Public Works Director was in the hands of the previous owner of the property).

6. As Public Works Director for the City of Lewiston between 1989 and 1999, I was familiar with the extent of discretionary authority of the City Engineering Department and the discretionary authority of the Public Works Director, as well as the discretionary authority of the City Manager as it dealt with matters under the direction of the Public Works Director.

7. During my tenure as Public Works Director, neither the City Engineer nor the Assistant City Engineer had discretionary authority to install or remove functioning portions of City infrastructure. Any decision to remove, install or substantially modify a functioning section of the City's storm drain system could not have been made by the Assistant City Engineer, but would have required the approval of the Public Works Director and the City Manager. During my tenure as Public Works Director, the discretion to approve public works that would compromise the capacity of the storm drain system in favor of traffic safety or convenience did not rest with the City Engineer and would have required full consideration of the consequences before a discretionary decision by Public Works was made.

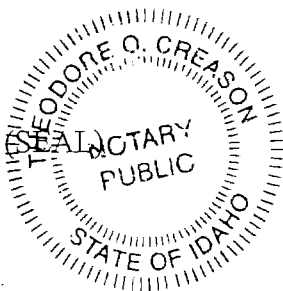
8. During my tenure, the removal of the surface valley gutter and installation of an underground pipe for channeling storm water across Idaho Street would have required consideration and approval by the Public Works Director and the City Manager, and perhaps the City Council as well.


DATED this 28th day of March, 2008.



Bud R. Van Stone

SUBSCRIBED AND SWORN to before me this 28th day of March, 2008.



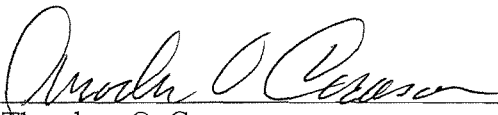

Notary Public in and for said State,
Residing at or employed in Lewiston.
My Commission Expires Mar. 9-28-09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of ~~March~~ ^{April}, 2008, a copy of the foregoing AFFIDAVIT OF BUD R. VAN STONE was served by the method indicated below, and addressed to the following:

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Theodore O. Creason

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2008 APR 24 AM 9 33

FATTY O. WEEKS
CLERK OF THE DIST. COURT
Pursneman
DEPUTY

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Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife, individually
and doing business as THOMPSON'S
AUTO SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political subdivision
of the State of Idaho,

Defendant.

Case No. CV07-00200

OBJECTION TO PLAINTIFFS'
MOTION FOR RECONSIDERATION

COMES NOW, the DEFENDANT, THE CITY OF LEWISTON, by and through its
Counsel of Record, Anderson, Julian and Hull LLP and respectfully submits this
Objection to the Motion for Reconsideration filed by the Plaintiffs in this matter.

INTRODUCTION

As the Court is well aware, the City of Lewiston previously filed a Motion for Summary Judgment. After reviewing the briefing and hearing the arguments by counsel, on March 20, 2008, this Court issued its Memorandum Opinion and Order on Motion for Summary Judgment. Part of the Court's decision was that "the City's argument for discretionary function immunity was well taken on the claim that the City was negligent in the design and replacement of the storm drain system." (Court's Memorandum Decision pg. 5.). In that decision, the Court recognized that the Assistant City Engineer made the decision to replace the valley gutter and that such a decision fell within the definition of a discretionary decision and the discretionary immunity was applicable. The Court then dismissed the Plaintiff's claims for the negligent design and replacement of the storm drain system.

In response to that decision, the Plaintiffs have filed a Motion for Reconsideration, based primarily upon the Affidavit of Bud Van Stone, a former Public Works Director for the City of Lewiston. The City submits that Bud Van Stone's Affidavit is irrelevant and immaterial because Mr. Van Stone acknowledges that he was not working for the City at the time of the events in question. Further, Mr. Van Stone does not have any first hand knowledge as to what authority Mr. Watson may have had or had been given concerning this project. Thus, Mr. Van Stone's Affidavit with regard to what an Assistant Engineer could or could not do on this project is based upon mere speculation and conjecture. The City submits that the Plaintiffs' Motion for Reconsideration is unwarranted and should be denied. For the Court's Convenience, Mr. Van Stone's Affidavit and the Plaintiff's arguments will also be addressed in further detail below.

BUD VAN STONE'S AFFIDAVIT IS IRRELEVANT AND IMMATERIAL.

As noted above, in support of their Motion for Reconsideration, the Plaintiffs submitted the Affidavit of Bud Van Stone, a former Public Works Director for the City of Lewiston. A review of Mr. Van Stone's Affidavit makes it clear that it is irrelevant to this matter. The first sentence of Mr. Van Stone's Affidavit notes that he worked for the City of Lewiston from 1989 – 1999. As the Court is well aware, this case pertains to the installation of a bubble up drainage system installed at the intersection of Idaho Street and 21st Street in 2003, approximately 4 years after Mr. Van Stone left the City of Lewiston.

It is reasonable and logical to assume that since Mr. Van Stone was not working at the City of Lewiston in 2003, he would not have any first hand knowledge or information concerning the authority Mr. Watson was given with regard to the bubble up project. Thus, any opinion Mr. Van Stone might have about Mr. Watson and his authority would be based simply upon conjecture and speculation. Idaho law is clear that opinions based upon mere speculation or conjecture are inappropriate to oppose a Motion for Summary Judgment. **Ryan v. Beisner** 112 Idaho 42, 46, 844 P.2d 24,28 (Ct. App.1992)

The issue as to whether Mr. Watson had the appropriate authority is also resolved through the Second Affidavit of John Watson, the Affidavit of Lowell Cutshaw and the Affidavit of Joel Riatau, all of which are filed contemporaneously herewith. Those Affidavits clearly assert that Mr. Watson had the appropriate authority to prepare the drawings concerning the bubble up system. The City Engineer approved of Mr.

Watson's drawings and the Public Works Director approved of the changes in the drain system. Thus, the issues concerning Mr. Watson's authority or lack thereof is moot.

**THIS COURT CORRECTLY RECOGNIZED THAT THE DECISION TO
INSTALL THE BUBBLE UP DRAIN WAS A DISCRETIONARY DECISION.**

In its Memorandum Opinion and Order on Motion for Summary Judgment, this court correctly recognized that discretionary function immunity stems from I.C. § 6-904(1). Generally, a discretionary function exception applies to governmental decisions entailing planning or policy formation. **Dorea Enter., Inc., v. City of Blackfoot**, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007).

Clearly, the preparation of plans for the installation of a bubble up drain is part of a planning process. The Court recognized that the plan developed by Mr. Watson for the replacement of the valley gutter was made, at least in part, because it was causing traffic problems. In this case, the Affidavit of Mr. Watson also indicated that the City Counsel approved of the plan. Thus, the actions of Mr. Watson in preparing the drawings and the plan for the installation of the bubble up system clearly constitute a discretionary function.

Further, as recognized by the Court, the mere fact that Mr. Watson was an Assistant Engineer does not preclude his decisions from being discretionary in nature. Idaho law is clear that the rank or status of the actor does not necessarily determine whether the decision is operational or discretionary. **Ransom v. Garden City**, 113 Idaho 202, 204, 743 P.2d 70, 72 (1987); See also, **Dorea Enterprises, Inc., v. City of Blackfoot**, *supra*. In his Affidavit, Mr. Watson, noted that part of the reason that it was decided to change the drain system was that the then existing valley gutter was causing

traffic problems. Clearly, such considerations are policy in nature and are not every day decisions.

Accordingly, this Court previously correctly ruled that the decision to modify and install the bubble up drain system was a discretionary decision for which the City of Lewiston is entitled to immunity pursuant to I.C. §6-904(1).

CONCLUSION

Based upon the foregoing, the City of Lewiston submits that the Plaintiff's Motion for Reconsideration should be denied. The previous Affidavit of John Watson and the other materials submitted to the Court clearly establish that the decision to install a "bubble up" drain system was discretionary decision to which I.C. §6-904(1) is applicable. Thus, the Court's previous Memorandum Opinion and Order on Motion for Summary Judgment dated March 20, 2008 correctly and properly dismissed the plaintiffs claims against the City of Lewiston for the alleged negligent design and replacement of the valley gutter with a catch basin and bubble-up system.

Also, contrary to the plaintiff's claims, the Affidavit of Bud Van Stone does not create a material question of fact and does not provide any justification for this Court to reverse its prior decision. Mr. Van Stone's Affidavit is inadmissible because it is irrelevant and immaterial. On its face, the Affidavits do not provide any information pertaining time-frame which is the subject of the Complaint. Although Mr. Van Stone was a previous Public Works Director for the City of Lewiston, his tenure in that position ended approximately four years prior to the events that lead up to this litigation. Thus, Mr. Van Stone does not have any first hand, personal knowledge which is relevant to this matter. Further, his opinions and thoughts about the authority Mr. Watson had or

may have had as an Assistant Engineer for the City of Lewiston are based upon mere conjecture or speculation and thus are not admissible and should not be utilized by this Court to reconsider its previous decision.

Therefore, the City of Lewiston urges this Court to continue to adhere to that portion of its decision dated March 20, 2008 wherein it dismissed the plaintiffs claims for negligent design and installation of the bubble up system at the intersection of Idaho Street and 21st Street based upon the immunity provided by I.C. §6-904(1).

DATED this 22nd day of April, 2008.

ANDERSON, JULIAN & HULL LLP

By 

Brian K. Julian, Of the Firm
Attorneys for DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2008, I served a true and correct copy of the foregoing **OBJECTION TO PLAINTIFFS' MOTION FOR RECONSIDERATION** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
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Lewiston, ID 83501
Telephone: (208) 743-1516
Facsimile: (208) 746-2231

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☐ Facsimile (208) 746-2231


Brian K. Julian

FILED
2008 APR 24 AM 9 33

PATTY O. WEEKS
CLERK OF THE DIST. COURT
Patty O. Weeks
DEPUTY

Brian K. Julian – ISB No. 2360
Amy G. White – ISB No. 5019
Chris H. Hansen, ISB No. 3076
ANDERSON, JULIAN & HULL LLP
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Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually and doing business as
THOMPSON'S AUTO SALES, INC., an
Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision of the State of Idaho,

Defendant.

Case No. CV07-00200

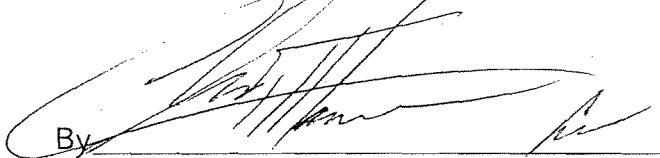
MOTION FOR RECONSIDERATION

COMES NOW, the Defendant the City of Lewiston, by and through its
counsel of record and respectfully moves this Court for an order reconsidering its
denial of its Motion for Summary Judgment with regard to negligent maintenance in
the above-entitled matter. The basis for this Motion is that at the time of the

hearing in this matter, the court reporter had not completed the transcript of the deposition of Keith Bingman. In that deposition, the procedures and protocols followed by the City with regard to the maintenance of the storm water drain system, particularly the drain at the intersection of 21st Street and Idaho Street in Lewiston, Idaho were identified and discussed. That based upon Rule 11(b)(3) this Court should consider this new information and reconsider its previous decision pertaining to the denial of the Defendant's Motion for Summary Judgment with regard to negligent maintenance. This Motion is further based upon the Memorandum in Support of Motion for Reconsideration and the Affidavit of Chris H. Hansen filed concurrently herewith.

DATED this 2nd day of April, 2008.

ANDERSON, JULIAN & HULL LLP

By 

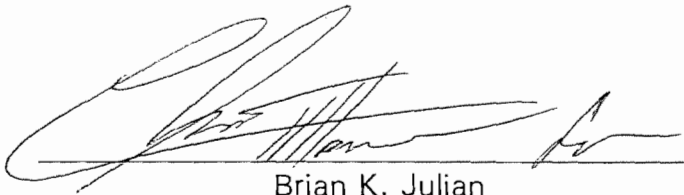
Brian K. Julian, Of the Firm
Attorneys for DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2008, I served a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Brian K. Julian

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PATTY O. WEEKS
CLERK OF THE DIST. COURT
Purkdamman
DEPUTY

Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually and doing business as
THOMPSON'S AUTO SALES, INC., an
Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision of the State of Idaho,

Defendant.

Case No. CV07-00200

MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION

COMES NOW, the City of Lewiston, by and through its counsel of record
and respectfully submits this Memorandum in Support of its Motion for
Reconsideration with regard to the Court's denial of its Motion for Summary
Judgment concerning negligent maintenance.

This Motion incorporates and includes by reference, the facts and documents filed with the Defendant's initial Motion for Summary Judgment. In addition to the evidence previously submitted to this Court, the City of Lewiston has submits the deposition of Keith Bingman. Although Mr. Bingman's was taken on January 15, 2008, the transcript was not available at the time of the hearing concerning the City Motion for Summary Judgment. In fact, counsel for the City received the transcript of Mr. Bingman's deposition at the Court hearing.

I.

STANDARDS FOR RECONSIDERATION

The City's Motion for Reconsideration is based upon Rule 11(b)(3) of the Idaho Rules of Civil Procedure. That rule allows the Court to reconsider a previous decision when additional, new evidence is submitted to it. As indicated above, the new additional evidence is the deposition of Keith Bingman. Mr. Bingman's deposition testimony provides this Court with additional information concerning the City's maintenance schedule, including the fact that the City tries to make sure that all of the storm drains are cleaned and inspected at least every two years.

The City is also submitting portions of the deposition of Mr. Roger Tutty. Mr. tutty is the plaintiff's expert. At the time of the hearing in February, Mr. Tutty's deposition transcript was also unavailable. (The City did submit a rough draft of the portions of the transcript.) The new information confirms the fact that although Mr. Tutty claims that the storm drains should have had additional maintenance, Mr. Tutty cannot identify or articulate an appropriate maintenance standard.

The City submits that when this new evidence is considered, this Court should reconsider and reverse its previous denial of the City's Motion for Summary Judgment with regard to the maintenance issue. The City would note that the frequency of maintenance is also a discretionary decision which would fall within the scope and immunity provided by I.C. §6-904(1).

In considering whether to grant summary judgment to the City, the City of Lewiston acknowledges that the typical standards for Summary Judgment set forth in Rule 56 of the Idaho Rules of Civil Procedure and by Idaho case law would be applicable.

II.

THE CITY PROPERLY MAINTAINED THE STORM DRAINS AT THE INTERSECTION OF 21ST AND IDAHO.

In this case, the Plaintiffs have failed to identify the cause of the flooding at the intersection of 21st and Idaho on or about May 19, 2006. As the Court is well aware, the Plaintiffs have claimed both negligent design and negligent maintenance. With regard to the claims of negligent maintenance, the plaintiffs have not identified with any specificity the manner in which the maintenance was lacking. In his deposition, Mr. Bingman described the frequency that the City performs maintenance on the storm drain system. The plaintiff's expert evidently cannot testify that the City's program is unreasonable or negligent. Thus, it is the City's position that the frequency and manner in which it maintains its storm water drain system is reasonable and adequate and that the claims against the City for negligent maintenance should be dismissed.

THE CITY OF LEWISTON'S FREQUENCY OF MAINTENANCE IS REASONABLE AND
UNDISPUTED AND FREQUENCY OF MAINTENANCE FALLS WITHIN I.C. §6-
904(1).

In the deposition of Keith Bingman, Mr. Bingman has testified that as part of its regular maintenance procedures, the City cleans out the various drains on a regularly scheduled basis. There are some areas of the city where the drains are cleaned annually, others are cleaned every two years. In his deposition, Mr. Bingman testified:

- Q. Okay. And is there a regular maintenance schedule for storm-sewer maintenance throughout the City of Lewiston?
- A. When you say "scheduled" you mean we are going to clean this one on this day; we are going to clean this one on that day?
- Q. Or within a five year period, we will have inspected and maintained all of the storm-sewer system in Lewiston or – and that's just an example.
- A. Right.
- Q. Or maybe it's once every two years we will have inspected them and and maintained or provided maintenance for the entire system, something like that?
- A. Yes.
- Q. Okay. And what is – what is the maintenance schedule that you can describe to me? What would it be?
- A. The maintenance – well, we clean the storm drains. We have a seasonal crew that comes in from March 1st until the end of July. And we will start off with our priority areas, the ones we have the most chronic problems with and then we'll move out to the other drains, like I told you before. And so, we have some that we do annually that we do up front, and then over a two-year period we will get the rest

of the – try to get the rest of the storm system. It depends on what else is happening, that's the goal. You try to cover the whole City in a two-year period.

Q. Okay. Do you have an inspection schedule also?

A. Inspections happen at the time of the storm-sewer maintenance. They are independent then.

(Bingman deposition, pg 17 L4- pg 18 L8)

Thus, Mr. Bingman's testimony is clear that the City of Lewiston utilizes a regular maintenance schedule to make sure that all of the city storm lines were functioning properly. The City submits that cleaning the storm drain lines at a minimum of approximately every two years. Such a program is reasonable and prudent.

Further Mr. Bingman clearly denied any failure of the maintenance department. Mr. Bingman stated:

Q. (BY MR. CREASON) I will just ask you first, are you aware of any failure of the maintenance department to properly maintain the storm-sewer system that crosses Idaho Street at Twenty-First Street prior to the flood of May 19th, 2006?

A. No.

(Bingman Deposition pg 24 L13 - L18)

Mr. Bingman also confirmed that his review of the maintenance records did not reveal any negligence by the City.

Q. (BY MR. CREASON) All right. Well, I'll just ask it one at a time then. Did you, in your review of documents and preparation for this deposition, find anything to indicate to you that the street maintenance department failed to properly maintain the storm water system across Idaho Street at its intersection of Twenty-First Street prior to that flood of May 19th, 2006?

A. No.

Q. Did you find anything in your review of those documents, from which you concluded, that the street maintenance department took some action in relation to the maintenance of that section as it crosses Idaho Street and Twenty-First Street that contributed to the flooding of the Thompson Auto property?

A. I am going to have to ask you to ask that again.

MR. CREASON: Why don't I have you read it back. That might help you.

MR. HANSEN: Objection for the -- it calls for a legal conclusion.

(Whereupon, the previous question was read back by the reporter)

A. So you're asking if we did anything -- when I reviewed the records, was there anything that I seen that the street department did that contributed to the --

Q. (BY MR. CREASON) Right. That's right.

A. That is what you're asking?

Q. Right.

A. No. I did not.

(Bingman Deposition pg 26 L7- pg 27 L11)

Significantly, Mr. Tutty, the Plaintiff's expert could not specify when or how often drains need to be cleaned. In his deposition, Mr Tutty admitted that he did not know or inquire about how often the city cleaned the storm drain system.

(Deposition of Roger Tutty pg. 41 LI 4 -21) Also, Mr. Tutty could not provide or describe a standard or level of maintenance that he thought was adequate. In his deposition, Mr. Tutty testified:

Q. Okay. Did you as part of your investigation talk with anybody at the City of Lewiston about their maintenance schedule other than getting the records for the storm-drain system?

A. No. I have not done that.

Q. Okay. If I represent to you that Mr. Bingman testified yesterday that their basic schedule is they clean certain specific areas annually, the more problematic areas. And the other areas they try to get to every two to three years. Using that assumption, do you think that maintenance schedule is adequate or inadequate?

MR. CREASON: I'll object to the form, but you can answer that if you can.

MR. HANSEN: Yeah.

A. Well, I would I guess I can say this in response, hindsight is twenty/twenty. Based on observations that I've made of the kind of the local drainage basin, it appears to be feeding water to the two inlets. I certainly wouldn't consider the level of maintenance that you describe as being adequate.

Q. (BY MR. HANSEN) In your analysis or were you able to find a standard or level of maintenance that you do believe is adequate?

A. Standards are difficult to impose. I came across kind of a newsletter type article that is put out by the local highway maintenance people in Boise that they send out stuff. They offered all sorts of advice on how to keep leaves out of the drain systems. Their argument was it cost sixty-eight dollars per curb mile to sweep the streets free of leaves, and it cost an awful lot more to clean these catch basins. But I guess that's the only additional information I have.

(Deposition of Roger Tutty pg. 41 L22 – pg. 42 L 11.)

The plaintiffs have the burden of proof ⁴ ~~to~~ must step forward with specific evidence, via affidavit, deposition or other admissible evidence to support their claims that the City's maintenance plan was inadequate or negligent. As noted above, the Plaintiffs expert believes that there should have been additional maintenance, but cannot identify any maintenance standard which he believes is more appropriate or more prudent than the plan utilized by the City. Thus, there is no evidence that the City's maintenance plan is negligent or inadequate. Idaho law

is clear that the plaintiffs cannot rely upon simple allegations to support their claims. (See Rule 56 of the Idaho Rules of Civil Procedure.) Here, the plaintiffs have not done so. Thus, to the extent that their claim is based upon the assertion that the maintenance program utilized by the City is inadequate, such claim fails.

The City would direct the Court's attention to the case of **Dorea Enterprises, Inc. v. City of Blackfoot**, ____ Idaho ____, 163 P.2d 211 (S.Ct. 2007). In that case, the Court considered whether the City of Blackfoot cleaned its sewer pipes with sufficient frequency. The Court in reviewing that decision granted the City's Motion for Summary Judgment. The Court noted that the policy implemented by the City was that they would clean the pipes annually and that annual cycle, the city would eventually clean all the pipes in town. In **Dorea**, supra, the Court noted that the decision concerning how frequently to clean the pipes related to the discretionary function and thus was immune under I.C. §6-904(1).

The Blackfoot is very similar to the case at bar. In this case, the City's procedures are that all of the storm drains within the city will be cleaned within a two year time period. Other than Mr. Tutty's unsubstantiated, unsupported criticism, there is no evidence that such a frequency in cleaning is inappropriate or inadequate. Therefore, since the Plaintiffs cannot identify any appropriate pertinent standard pertaining to the frequency of the cleaning and that the City has failed to comply with that standard, this Court should grant summary judgment to the City with regard to the frequency of cleaning.

**THERE IS NO EVIDENCE THAT THE ALLEGED FLOOD WAS CAUSED BY
NEGLIGENT MAINTENANCE**

Under Idaho law, in order to establish a claim for negligence, the plaintiffs must establish four elements. As the Court is well aware, those elements are a 1) a duty; 2) breach of the duty; 3) causation, and 4) damages. **McKim v. Horner**, 143 Idaho 568, 149 P.3d 843 (2006). In general, Idaho law also provides that the fact that an accident or other unfortunate event occurs does not necessarily establish negligence. In **Jerome Thriftway Drug, Inc v. Winslow**, 110 Idaho 615, 717 P.2d 1033 (1986) recognized that "the mere occurrence of a fire does not raise a presumption nor an inference of negligence". The same rationale is applicable here. The fact that a flood occurred, in and of itself, does not raise any presumption or inference that the City was negligent in any manner.

Instead, the plaintiffs must step forward with evidence to support their claim of negligence. To date, the plaintiffs have identified virtually no evidence that the flood at the intersection of 21st and Idaho Street occurred because the inlet or the pipe was blocked or plugged prior to the flood on May 19, 2006. Absent that evidence, the plaintiff's claims for negligent maintenance cannot be established.

Although Mr. Tutty testified that he observed some leaves in the catch basins at the intersection of Idaho Street and 21st Street, all of those observations were made after the flood on May 19, 2006. Thus, there is no evidence that the flood was caused by the fact that the pipe was allegedly plugged or full of leaves.

III.

CONCLUSION

Based upon the foregoing, the City requests this Court to reconsider its denial of the Motion with regard to negligent maintenance. The deposition of Keith

Bingman provides the Court with the additional information and evidence that it needed to fully decide the negligent maintenance issue. Based upon the testimony of Mr. Bingman, the city storm drains are maintained on a regular basis and at a minimum, all drains are cleaned at least every two years. The plaintiffs have made no showing whatsoever that such a maintenance schedule is inadequate or negligent.

Further, the decision to establish a maintenance schedule is a discretionary decision for which immunity under I.C. §6-904(1) is applicable. As noted in **Dorea**, supra, such schedules involve issues concerning personnel, machinery and financial constraints. Under the **Dorea** case, supra, even if the plaintiffs were to show a more aggressive maintenance schedule might be prudent, the City is immune for such a decision.

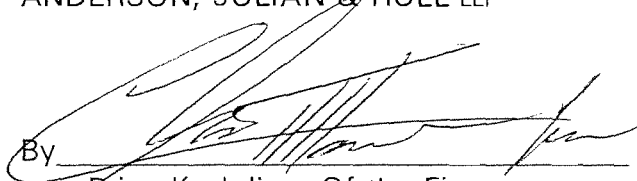
Finally, there is nothing in the record whatsoever to show that the flooding was caused by negligent maintenance by the City. There are no affidavits, depositions or any other evidence that claim or establish that the storm drain was plugged prior to the storm. In this case, Mr. Tutty, the Plaintiffs own expert estimated that the severe storm was a once in a 35 year storm. (Deposition of Roger Tutty pg 57 L 20 - pg 58 L6) Obviously, a storm of such size creates a situation which might cause leaves, and other debris to collect in the catch basins and in the storm drain system. However, those items would be removed when the pipe is later cleaned as a part of the regular maintenance cycle.

Accordingly, the City asserts that plaintiffs have failed to establish a viable claim for negligent maintenance. The plaintiffs have produced no proof that the

maintenance schedule utilized by the city is negligent or that the maintenance work performed by the City workers was negligent. Absent such evidence, the plaintiff's claims for negligent maintenance are wholly without merit. Therefore, this Court should reconsider its previous decision regarding negligent maintenance and grant the City's Motion for Summary Judgment.

DATED this 22nd day of April, 2008.

ANDERSON, JULIAN & HULL LLP

By 

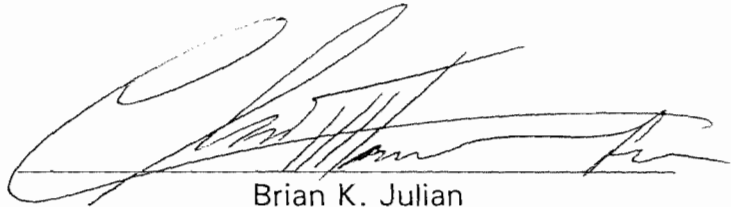
Brian K. Julian, Of the Firm
Attorneys for DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2008, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
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Brian K. Julian

1. That the statements contained herein are made of your Affiant's own personal knowledge and are true and correct to the best of his information.

2. That your affiant is one of the Attorneys for the City of Lewiston in this matter.

3. That attached hereto as Exhibit "A" are true and correct copies of portions of the deposition of Keith Bingman, specifically pgs 17, 18, 25, 26 and 27.

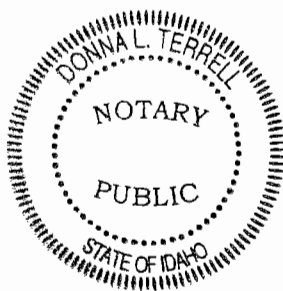
3. That attached hereto as Exhibit "B" are true and correct copies of portions of the deposition of Roger Tutty, specifically pgs 41, 42, 57 and 58.

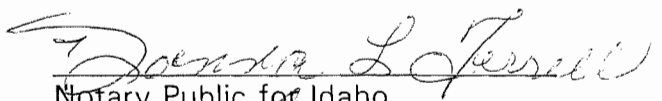
FURTHER your Affiant saith naught.



Chris H. Hansen

SUBSCRIBED AND SWORN to before me this 22 day of April, 2008.



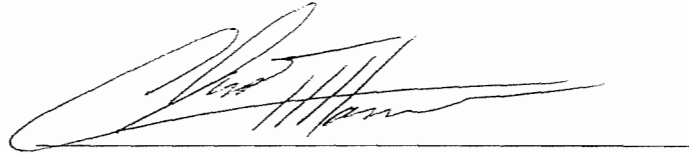

Notary Public for Idaho
Residing at Boise Idaho
My Commission Expires: 4-28-2011

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2008, I served a true and correct copy of the foregoing **AFFIDAVIT OF CHRIS HA. HANSEN IN SUPPORT OF MOTION FOR RECONSIDERATION** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Chris H. Hansen

IN THE DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually, and THOMPSON'S
AUTO SALES, INC., an Idaho
corporation,

Case No. CV 07-00200

COPY

Plaintiffs,

vs

CITY OF LEWISTON, a political
subdivision in the State of
Idaho,

Defendant.

Taken at 1219 Idaho Street
Lewiston, Idaho
Tuesday, January 15, 2008 - 11:00 a.m.

D E P O S I T I O N
OF
KEITH BINGMAN

A P P E A R A N C E S

THEODORE O. CREASON, Esq., of the law firm of Creason
Moore and Dokken, PLLC, 1219 Idaho Street, Post Office
Drawer 835, Lewiston, Idaho 83501,
appearing on behalf of the Plaintiffs.

CHRIS H. HANSEN, Esq., of the law firm of ANDERSON
JULIAN AND HULL, LLP, C.W. Moore Plaza, 250 South Fifth
Street, Suite 700, Post Office Box 7426, Boise, Idaho
83707-7426,
appearing on behalf of the Defendant.

AFFIDAVIT OF CHRIS H. HANSEN IN SUPPORT
OF MOTION FOR RECONSIDERATION



1 A. Yes.
 2 Q. Okay. And would you describe that to me?
 3 A. Again, just different training seminars through
 4 the T2 Center at the University of Idaho. Just
 5 different stormwater maintenance techniques and
 6 practices.
 7 Q. Do you hold any certificates for having
 8 completed any courses that deal with stormwater
 9 management?
 10 A. Yeah. Yeah. Yes.
 11 Q. And when did you obtain those?
 12 A. I couldn't tell you. It's been a long time.
 13 Q. Okay. Can you tell me in general terms what
 14 they teach you?
 15 A. Ditching, storm line jetting, pipe
 16 installation, culvert installation.
 17 Q. Was your obtaining this technical training a
 18 condition of your employment?
 19 A. It was provided as part of my employment.
 20 Q. All right. In other words, did you have to
 21 participate in it in order to hold the job of pavement
 22 management technician?
 23 A. I guess I don't know how to answer that as....
 24 Q. In other words, as part of your holding your
 25 job, was, of course, contingent on you showing up at

1 function of your street maintenance duties?
 2 A. No.
 3 Q. Okay. Is it a primary function then of street
 4 maintenance crews?
 5 A. I guess that's where I'm getting goofed up. I
 6 don't look at them as primary or secondary. They are
 7 all a function of that -- an even function -- I look at
 8 it as an even function of that department.
 9 Q. Okay. Did you have -- well, excuse me. Did
 10 Mike Chamberlin in 2003 have the responsibility for --
 11 for deciding the maintenance schedules for the
 12 storm-sewer system in Lewiston?
 13 A. Yes, yeah. The responsibility, yes.
 14 Q. And do you hold that now?
 15 A. Yes.
 16 Q. Okay. And what determines what the storm-sewer
 17 maintenance schedule is going to be? What does the
 18 storm-sewer maintenance manager take into consideration
 19 in determining what maintenance is required?
 20 A. Let's see, what we are looking at is our main
 21 -- what our main problem areas are. And I'm trying to
 22 put this the shortest way. When you're -- what you're
 23 looking for is you're looking for, you know, what are
 24 your chronic areas that you have to maintain. And then,
 25 of course, from that, you move out into just our normal

1 work and so forth.
 2 A. (Witness nods head.)
 3 Q. But was it also contingent on your successfully
 4 completing your training for the storm-sewer
 5 maintenance?
 6 A. I don't believe so.
 7 Q. Do you know whether or not Mike Chamberlin had
 8 any technical training in storm-sewer maintenance?
 9 A. I don't know.
 10 Q. Is storm-sewer maintenance kind of a secondary
 11 function of street maintenance at the City of Lewiston?
 12 A. It's -- I don't know how to answer that. Can
 13 you ask that another way?
 14 Q. Well, I can try. I understand that your job
 15 title is street maintenance manager. It doesn't say
 16 anything at all about storm-sewer maintenance or the
 17 like. However, if I understand your testimony
 18 correctly, your people are the storm-sewer
 19 maintenance --
 20
 21 A. Uh-huh.
 22 Q. -- people --
 23 A. Yes.
 24 Q. -- for the City of Lewiston. Okay? Now, is
 25 that then, the storm-sewer maintenance, a secondary

1 cleaning, your regular maintenance cleaning. So your
 2 schedule is determined -- your schedule is determined on
 3 where you have the most problems.
 4 Q. Okay. And is there a regular maintenance
 5 schedule for storm-sewer maintenance throughout the City
 6 of Lewiston?
 7 A. When you say "scheduled," you mean we are going
 8 to clean this one on this day; we are going to clean
 9 this one on that day?
 10 Q. Or within a five-year period, we will have
 11 inspected and maintained all of the storm-sewer system
 12 in Lewiston or -- and that's just an example.
 13 A. Right.
 14 Q. Or maybe it's once every two years we will have
 15 inspected them and maintained or provided maintenance
 16 for the entire system, something like that?
 17 A. Yes.
 18 Q. Okay. And what is -- what is the maintenance
 19 schedule that you can describe to me? What would it be?
 20 A. The maintenance -- well, we clean storm drains.
 21 We have a seasonal crew that comes in from March 1st
 22 until the end of July. And we will start off with our
 23 priority areas, the ones we have the most chronic
 24 problems with, and then we'll move out to the other
 25 drains, like I told you before. And so, we have some

1 that we do annually that we do up front, and then over a
2 two-year period we will get the rest of the -- try to
3 get the rest of the storm system. It depends on what
4 else is happening. That's the goal. You try to cover
5 the whole City in a two-year period.

6 Q. Okay. Do you have an inspection schedule also?

7 A. Inspections happen at the time of storm-sewer
8 maintenance. They are independent then.

9 Q. Okay. Are inspection records kept for the City
10 of Lewiston?

11 A. The only ones that we would have is if we had
12 -- if we had a system that we thought was failing or
13 something like that. We keep a record of that so we can
14 schedule that for, you know, some time of construction
15 maintenance.

16 Q. Is there any check-off list of any kind that
17 you could look at and go back and verify that a certain
18 part of the storm sewer had received its regular
19 inspection and maintenance?

20 A. We just track them. We track them by area.
21 So, if we had done storm-system work -- storm systems in
22 a specific area, and when those - that's what we would
23 enter into our database that we cleaned the storm
24 systems on this area on this date and....

25 Q. Is there any record prior to 2003 at the City

1 of Lewiston that reflects inspection of the -- or
2 maintenance of the stormwater system in Lewiston as it
3 crosses Idaho Street at the intersection of Twenty-First
4 Street?

5 A. It would be, yeah.

6 Q. There is?

7 A. Not specifically. It would be, like I said, as
8 an area that that particular -- that particular system
9 is in Area One. So we would be able to show we cleaned
10 storm systems in Area One on this date.

11 Q. Okay. And did you review any documents in
12 preparation for this deposition today?

13 A. Yes.

14 Q. And what documents did you -- did you review?

15 A. I went back and took a look at our weather
16 records, went through a log of phone calls that my
17 office received during that storm, went through the
18 reports that I had done on that storm system down here,
19 what I had been asked for.

20 Q. Okay. And did you separate out those things
21 that you reviewed that you just described to me?

22 A. Did I separate them out?

23 Q. I'm going to ask Counsel to provide me a copy
24 of those things that you reviewed?

25 A. Uh-huh.

1 Q. I'm just wondering if -- you didn't bring
2 them with you today, I take it?

3 A. No.

4 Q. And did you keep them in a separate -- did you
5 segregate them out so you can identify them for the
6 City's lawyers?

7 A. Yeah.

8 Q. So, I can have copies of them?

9 A. Sure.

10 Q. Okay. And were -- did you -- did you come to
11 any conclusions -- well, let me ask you this first, did
12 those documents that you reviewed of the records, the
13 log of telephone calls you received during a certain
14 storm and the reports that you reviewed, did that
15 refresh your recollection as to the events that led up
16 to the flooding of the Thompson Auto lot at the corner
17 of Twenty-First and Idaho Street?

18 A. Did it refresh my recollection?

19 Q. Right.

20 A. Yeah.

21 Q. Okay. Do you recall the date that the storm
22 happened that flooded Thompson Auto?

23 A. Yes.

24 Q. What was that date?

25 A. May 19th, 2006.

1 Q. Were you on duty that day?

2 A. Yes.

3 Q. Okay. Was Mike Chamberlin on duty also?

4 A. He had retired by then, so....

5 Q. Were you then already the appointed street
6 maintenance manager?

7 A. Yes.

8 Q. Must have been like the first day of the job?

9 A. May 19th.

10 Q. Well, nice way to start.

11 A. Believe me it was an unbelievable month.

12 Q. I could ask you why you didn't do something
13 about this weather we were having.

14 Anyway, when did you -- when did you first
15 learn that Thompson Auto had been flooded?

16 A. I don't have an exact date. It was the week
17 after -- after that rain.

18 Q. So you didn't actually observe the water coming
19 across the lot --

20 A. No.

21 Q. -- and so forth?

22 MR. HANSEN: Let him finish his question.

23 MR. BINGMAN: I'm trying.

24 Q. (BY MR. CREASON) Did you review any documents
25 that reflected any prior incidences of stormwater

1 flooding Thompson Auto property.

2 A. Ask that again.

3 Q. Did you review any documents in preparation for
4 this deposition that reflected any prior incidences of
5 stormwater flooding Thompson Auto?

6 A. No.

7 Q. Are you familiar with any other incidences that
8 involved stormwater flooding on the Thompson Auto
9 property?

10 A. No.

11 Q. Do you regularly review weather records as part
12 of your duties as street maintenance manager for the
13 City of Lewiston?

14 A. Yeah.

15 Q. Okay. And what's -- what purpose do you have
16 for reviewing weather records?

17 A. Mostly in the wintertime for winter storms and
18 stuff like that.

19 Q. Why is that important?

20 A. Well, we have a snow policy that we try to
21 follow, so we are constantly monitoring so we can tell
22 when storms are coming in.

23 Q. You have to put additional people on duty if
24 you're going to have to do some --

25 A. Yeah. If a snow storm is coming in, we like to

1 A. I was just trying to remember what -- what type
2 of a day it was.

3 Q. Did you inspect the damage that had been done
4 by the stormwater at Thompson Auto after May 19th, 2006?

5 A. No.

6 Q. Did you review any inspection reports that
7 reflected damage done to Thompson Auto after the flood
8 of May 19th, 2006?

9 A. I don't understand that one. Re-ask that one.

10 Q. Did you review any records that reflected
11 damage done to the Thompson Auto lot after the flood of
12 May 19th 2006?

13 A. Yes.

14 Q. What records did you review in that regard?

15 A. Roger Tutty's report.

16 Q. Anything else?

17 A. That would be the only thing. I seen the
18 damage to the property.

19 Q. And were you able to determine anything with
20 respect to whether the street maintenance department had
21 done its regular maintenance properly by reviewing these
22 documents prior to -- that is, had they done their job
23 properly as maintenance prior to the storm of May 19th,
24 2006?

25 A. I guess I don't understand that question.

1 pre-wet the roads, so we would like to know that's
2 coming so we can -- we like to have that kind of
3 information because we would like to be able to go out
4 and pre-wet the roads and get some deicer down before a
5 storm hits, try to get a little head start on it.

6 Q. Do you review weather records in the summertime
7 to determine whether a rain storm is coming through?

8 A. If we hear it in the weather forecast that a
9 storm might be coming through, then we might take a look
10 and try to follow that and see if it's coming in.

11 Q. Do you do anything in preparation for it if you
12 determine that there is a heavy storm coming?

13 A. On a rain storm probably just make sure that we
14 have people available if it's going to hit after hours
15 or something. We have a good list of people to call.

16 Q. Were you able to determine whether the street
17 maintenance -- well, I guess it was you. Did you
18 determine before the storm of May 19th, 2006, that a
19 rain storm was coming this way?

20 A. I had absolutely no clue.

21 Q. Okay. Had you checked the weather forecast?

22 A. No.

23 Q. When you checked the weather forecast -- excuse
24 me, the weather records in preparation for this
25 deposition, what were you looking for?

1 Q. Probably a bad question. But did you identify
2 anything that led you to believe that, or you to
3 conclude that the City street maintenance department had
4 failed to carry out its maintenance of that storm-sewer
5 system that crosses Idaho Street at its intersection
6 with Twenty-First Street prior to that storm of May 19th
7 of 2006?

8 MR. HANSEN: Object to form. I think it calls
9 for a legal conclusion. Go ahead and answer.

10 MR. BINGMAN: I guess I'm still not
11 understanding. I'm not following.

12 MR. CREASON: Okay. Let me try again.

13 Q. (BY MR. CREASON) I will just ask you first,
14 are you aware of any failure of the maintenance
15 department to properly maintain the storm-sewer system
16 that crosses Idaho Street at Twenty-First Street prior
17 to the flood of May 19th, 2006?

18 A. No.

19 Q. Okay. And after your review of the documents,
20 did you determine -- in preparation for this
21 deposition --

22 A. (Witness nods head.)

23 Q. -- did you determine whether or not the City
24 street maintenance department had done or failed to do
25 anything in its maintenance of that storm system that

1 contributed to the flooding of Thompson Auto?
 2 MR. HANSEN: Object to the form. Go ahead.
 3 A. I guess -- I guess when you're asking the
 4 question, I -- I guess I don't know whether to answer --
 5 I guess depending on how you're putting the question it
 6 is yes or no, I guess.
 7 Q. (BY MR. CREASON) All right. Well, I'll just
 8 ask it one at a time then. Did you, in your review of
 9 documents and preparation for this deposition, find
 10 anything to indicate to you that the street maintenance
 11 department had failed to properly maintain the
 12 stormwater system across Idaho Street at its
 13 intersection of Twenty-First Street prior to that flood
 14 of May 19th, 2006?
 15 A. No.
 16 Q. Did you find anything in your review of those
 17 documents, from which you concluded, that the street
 18 maintenance department took some action in relation to
 19 the maintenance of that section as it crosses Idaho
 20 Street and Twenty-First Street that contributed to the
 21 flooding of the Thompson Auto property?
 22 A. I'm going to have to ask you to ask that again.
 23 MR. CREASON: Why don't I have you read it
 24 back. That might help you.
 25 MR. HANSEN: Objection for the same -- it calls

1 for a legal conclusion.
 2 (Whereupon, the previous question was read back
 3 by the reporter.)
 4 A. So you're asking if we did anything -- when I
 5 reviewed the records, was there anything that I seen
 6 that the street department did that contributed to
 7 the --
 8 Q. (BY MR. CREASON) Right. That's right.
 9 A. That's what you're asking?
 10 Q. Right.
 11 A. No. I did not.
 12 Q. Okay. Did you in preparation for the
 13 deposition review the 2003 street maintenance project
 14 drawings?
 15 A. Yes.
 16 Q. Were you involved in preparing the 2003 street
 17 maintenance project?
 18 A. Yes.
 19 Q. What was your involvement, please, in the 2003
 20 street maintenance project?
 21 A. I -- I was the one that accumulated
 22 measurements and did the initial measurements and
 23 quantities for the project, and set up the schedule for
 24 which roads were going to receive maintenance that year.
 25 Q. Okay. At whose direction did you do the

1 measurements and the quantities and the schedules?
 2 A. Mike Chamberlin's.
 3 Q. Is this -- was this a routine street
 4 maintenance project?
 5 A. That one that year was a little bit new because
 6 it had a water project attached to it.
 7 Q. Did you work with anyone else in developing the
 8 measurements and the quantities and the maintenance
 9 schedule?
 10 A. I just did a schedule of maintenance and stuff
 11 like that, and everything else went to John Watson.
 12 Q. What about the measurements?
 13 A. I did the measurements.
 14 Q. What measurements did you do?
 15 A. I do measurements for the streets, what we were
 16 doing on the streets that year. How much area we are
 17 going to patch.
 18 Q. Did you also do the measurements on the water
 19 project?
 20 A. No.
 21 Q. Who did the measurements on the water project?
 22 A. I couldn't tell you. I don't know.
 23 Q. Was it somebody in the street maintenance
 24 department?
 25 A. No.

1 Q. Which department in the City of Lewiston is
 2 responsible for overseeing the maintenance project for
 3 the 2003 street maintenance project?
 4 MR. HANSEN: Object to the form. You lost me.
 5 I apologies.
 6 MR. CREASON: Let me restate that.
 7 Q. (BY MR. CREASON) Which department in the City
 8 of Lewiston was responsible for overseeing the 2003
 9 Street Maintenance Project?
 10 A. What do you mean by "overseeing?"
 11 Q. Somebody in charge out there.
 12 A. I guess --
 13 MR. HANSEN: You mean during the construction
 14 or after it's done? I don't mean to be....
 15 MR. CREASON: Let me go one step at a time.
 16 Q. (BY MR. CREASON) Did you see this 2003 street
 17 maintenance as a project?
 18 A. Yes.
 19 Q. Okay. And does it have a project manager?
 20 A. Yes.
 21 Q. Okay. Who's the project manager?
 22 A. That would be the City Engineer.
 23 Q. And who was that?
 24 A. I believe that was Lowell Cutshaw.
 25 Q. Did the project also have a superintendent?

IN THE DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.)
THOMPSON, husband and wife,)
individually, and THOMPSON'S)
AUTO SALES, INC., an Idaho)
corporation,)

Case No. CV 07-00200

Plaintiffs,)

vs)

CITY OF LEWISTON, a political)
subdivision in the State of)
Idaho,)

Defendant.)

COPY

Taken at 1219 Idaho Street
Lewiston, Idaho
Wednesday, January 16, 2008 - 9:00 a.m.

D E P O S I T I O N
OF
ROGER TUTTY

A P P E A R A N C E S

THEODORE O. CREASON, Esq., of the law firm of Creason
Moore and Dokken, PLLC, 1219 Idaho Street, Post Office
Drawer 835, Lewiston, Idaho 83501,
appearing on behalf of the Plaintiffs.

CHRIS H. HANSEN, Esq., of the law firm of ANDERSON
JULIAN AND HULL, LLP, C.W. Moore Plaza, 250 South Fifth
Street, Suite 700, Post Office Box 7426, Boise, Idaho
83707-7426,
appearing on behalf of the Defendant.

AFFIDAVIT OF CHRIS H. HANSEN IN SUPPORT
OF MOTION FOR RECONSIDERATION



1 an inch thick. Sometimes it's two inches thick.
 2 Q. Okay. And these catch basins, how deep are
 3 they?
 4 A. Well, the -- I would say that probably the one
 5 at the northwest corner of the intersection is probably
 6 maybe four foot deep, maybe five foot deep.
 7 Q. Okay.
 8 A. I think the one up at the -- on the southwest
 9 corner of the intersection is not as deep.
 10 Q. Okay. And we are going to take these one at a
 11 time. For the pipe on the southwest corner, the one
 12 that is not as deep --
 13 A. Uh-huh.
 14 Q. -- three feet, is that about right?
 15 A. I think it's a little deeper than three feet.
 16 Q. Okay.
 17 A. I've got this -- I've got a piece of rebar that
 18 I just (indicating), and the rebar is about five foot
 19 high.
 20 Q. Okay.
 21 A. Five foot long.
 22 Q. And as I understand these catch basins, what
 23 they are is effectively a concrete box with an outlet at
 24 least on the southwest corner?
 25 A. Uh-huh.

1 Q. That's up off the bottom a little bit; is that
 2 correct?
 3 A. Yes.
 4 Q. Was the leaf level above or below this water
 5 outlet pipe?
 6 A. Well, it depends on -- I've visited the catch
 7 basin quite a few times during the last year.
 8 Q. Okay.
 9 A. And it depends -- you know, it varies.
 10 Sometimes the leaf level and the outlet, the whole
 11 outlet is exposed to view, the entire depth of the
 12 outlet. Sometimes the leaf level is sitting up there a
 13 third of the way or half of the way up the diameter of
 14 the pipe, the outlet pipe. I have seen on occasion leaf
 15 material that's trying to get in through the grate. You
 16 know, it hasn't made it yet, but probably some came down
 17 through the end of a run-off period and there was no
 18 additional water to push it in.
 19 Q. And since you visited, at least the southwest
 20 grate on a number of occasions, my impression is that
 21 the level or the amount of debris that you're seeing in
 22 the catch basin seems to change?
 23 A. Uh-huh, yeah.
 24 Q. Is that correct?
 25 A. Yes.

1 Q. Could that change be caused by maintenance
 2 being conducted by the City?
 3 MR. CREASON: Object to the form, calls for
 4 speculation, but you can answer if you can.
 5 A. Well, I think to be specific in terms of an
 6 opinion.
 7 Q. Sure.
 8 A. I don't think the level of leaf debris is the
 9 result of maintenance by the City.
 10 Q. Okay.
 11 A. I think the level of leaf debris is a result of
 12 the lack of maintenance by the City.
 13 Q. Okay. And what is your understanding as to
 14 what maintenance program, if any, that the City has for
 15 its storm-gutter system?
 16 A. Well, I looked -- the City gave me a copy of
 17 its maintenance reports, and it's difficult sometimes
 18 for me to draw conclusions as to what they were doing,
 19 where they were doing it, what date it was being done,
 20 and that data is not consistently recorded.
 21 But I would say what the City does do is
 22 probably drop an -- it's sort of like a Shop Vac type of
 23 arrangement except it's a big Shop Vac, and it's mounted
 24 on a truck and it's got maybe an eight-inch suction --
 25 flexible suction pipe. Lift off the grate, drop it into

1 the basin, turn on the vacuum, suck everything thing out
 2 of the bottom of the basin, turn it off, pull it out,
 3 put the grate back on.
 4 Q. All right. And do you have any understanding
 5 as to how often that occurs?
 6 A. That's the problem I found with the records. I
 7 couldn't tell from the records they gave me. I couldn't
 8 tell really where they are exactly working. There's
 9 conflicts between activity dates, location, points,
 10 geographic location data. I don't think there's any
 11 time of day or anything like that. But it is very
 12 inconsistent. So I can't -- I don't think I can answer
 13 that question any more directly.
 14 Q. All right. Yesterday the deposition of
 15 Mr. ROGER TUTTY was taken. Do you know Mr. Bingman?
 16 A. I don't know that I have met him, no.
 17 Q. Okay. Did you as a part of your investigation
 18 talk with anybody at the City of Lewiston about their
 19 maintenance schedule other than getting the records for
 20 the storm-drain system?
 21 A. No. I have not done that.
 22 Q. Okay. If I represent to you that Mr. Bingman
 23 testified yesterday that their basic schedule is they
 24 clean certain specific areas annually, the more
 25 problematic areas. And the other areas they try to get

1 Idaho Street to the northern direction and looked at
 2 number two, there's no outflow; is that correct?
 3 A. I would say there's very little outflow.
 4 Q. Okay.
 5 A. Very little outflow.
 6 Q. Can you compare the amount of outflow you
 7 observed in grate number two with the volume of water
 8 that you would see immediately above grate number one?
 9 For instance, is it catching one percent, five percent
 10 or could you do that?
 11 A. That's pretty tough to do, but it was extremely
 12 small.
 13 Q. Okay. Less than ten percent?
 14 A. I think less than ten percent. I don't know.
 15 Q. Okay.
 16 A. I don't think any water -- I guess my basic
 17 point is, if there are -- I can tell you an example of
 18 how the water might get in there, but let's say you have
 19 this flow of water going down here (indicating) in the
 20 gutter and because of the slope, velocity is passing
 21 over the top of the gutter grade, and it's going right
 22 on by the curb opening because the curb opening is so
 23 short, and then there's some guy that comes up the
 24 street in a big four-wheel drive pickup truck, and he
 25 wants to see how high he could make the water splash.

1 So he comes up here about thirty miles an hour, and once
 2 he's doing it, he's moving the water out of the path of
 3 the gutter to the side, and it's doing this
 4 (indicating). Well, when that happens, then you're
 5 going to get water into the curb inlet and conceivably
 6 if he drives close enough to the grate, he may actually
 7 force it through the grate. And that's going to wind up
 8 coming out down here (indicating), so....
 9 Q. Okay.
 10 A. That can happen.
 11 Q. All right. Earlier you said that if you were
 12 trying to design a grate for a slope greater than five
 13 degrees, the -- the grate bars, if you will, will needed
 14 to run parallel to the flow of the water, correct?
 15 A. It's not five degrees. It's five percent.
 16 Q. I'm sorry.
 17 A. And -- but the best way to trap water running
 18 on a slope like that is to have the bar maybe a
 19 half-inch wide running parallel to the direction of
 20 flow. And the space between the bars may be twice
 21 as wide or an inch longer or an inch-and-a-half wide.
 22 Q. In this case, what is the configuration of the
 23 grate of number one, if you recall?
 24 A. It's a rectangular opening. There's a hole.
 25 The whole surface of the grate has got some rectangular

1 openings that are probably two inches by four inches
 2 separated by metal that's probably an inch wide or
 3 something like that. They have -- I think the entry
 4 slope through the grate, the slope of the grate opening
 5 through the grate, from top to bottom is probably on a
 6 -- maybe forty-five to sixty degrees off the plane of
 7 the grate, you know. And obviously they are trying to
 8 capture the water that can get in there, you know. But
 9 that's an efficient grate.
 10 Q. An inefficient or efficient?
 11 A. It's an efficient grate.
 12 Q. Okay.
 13 A. Once you get below five percent slope.
 14 Q. Okay.
 15 A. It's an inefficient grate because it tends to
 16 trap leaf debris, pop can debris, before it gets in
 17 there.
 18 Q. Okay. My impression is you have been kind of
 19 watching these grates since you were initially hired on
 20 this deal, is that fair?
 21 A. I have certainly been watching them then, but I
 22 didn't -- it wasn't unknown to me before. I mean
 23 Oregon, we get a lot more rain than they do in Lewiston,
 24 and you have got the same problem on an airport. You
 25 never try to capture a hundred percent of water that

1 comes off the runway. You'd burn up the budget in pipe
 2 to do it, you know.
 3 Q. At any time have you ever seen the City out
 4 trying to maintain these grates we have designated as
 5 number one and number two on Exhibit No. 2?
 6 A. Sure. Maybe -- I don't know -- I think -- I
 7 think I may have seen, during the course of a storm, the
 8 crews trying to clear the leaf debris off the entrance
 9 to a grate. Or they had -- and I observed quite a bit
 10 of work doing that type of activity on the street
 11 systems south and west of this intersection.
 12 Q. Okay. Let me go back to Exhibit No. 1, your
 13 report first.
 14 A. Uh-huh. Sure.
 15 Q. On the second paragraph of your report it says
 16 -- the second sentence talks about a large storm caused
 17 wide spread flooding. Do you see that here? It's right
 18 here (indicating).
 19 A. Sure, yeah.
 20 Q. Did you make any attempts to quantify the size
 21 of this storm? As I understand the storms come in five
 22 year storms, ten year storms, twenty year storms?
 23 A. Uh-huh.
 24 Q. Did you make any attempt to quantify this
 25 storm?

1 A. Sure.
 2 Q. What did you decide or determine?
 3 A. My judgment it was about a thirty-five year
 4 storm if you accept the idea that the rainfall in this
 5 drainage basin was the same as the rainfall where the
 6 rain gauge was.
 7 Q. The rain gauge is probably at the airport, do
 8 you know?
 9 A. I'm sure there is a rain gauge at the airport.
 10 And I recall, I think it was probably in the newspaper
 11 when this particular storm -- I think they -- if I
 12 recall correctly, they did report the airport as having
 13 -- the rain gauge at the airport had logged it.
 14 Q. And is there a standard, to your knowledge,
 15 when you design or construct a storm-drain system as to
 16 the size of storm that the system is designed to
 17 accommodate?
 18 A. Well, I think every City probably -- or every
 19 county road department probably decides what kind of
 20 storm they are going to accommodate. If you -- it costs
 21 a lot of money to take care of storm systems. It costs
 22 a lot of money to install storm systems.
 23 Q. Do you know what size of storm, if you will,
 24 that the City of Lewiston designed its gutters and its
 25 storm systems for?

1 A. You know, I don't think I have seen that. The
 2 only thing I can say is if you -- if you put -- if you
 3 put -- you know, if you start regardless of where you
 4 are in the City, if you got a piece of vacant ground,
 5 say just grass, and you put in a building that's got a
 6 roof, then what they say is that the water coming down
 7 on the roof from a storm is in effect a hundred percent
 8 of that water is going to run off the roof onto the
 9 ground, and they want you to trap that water so that the
 10 water that leaves the property with the roof on it is
 11 leaving it no faster or in a greater quantity than what
 12 it used to when it was all grass. And they used a
 13 twenty-five year storm for that.
 14 Q. And that standard building, where does that
 15 standard come from?
 16 A. Oh, it comes out of -- it's Ordinance 8100. It
 17 was -- I think eighty refers to the year, I believe, it
 18 was adopted. And one hundred is the sequence number for
 19 the Ordinance.
 20 Q. Okay.
 21 A. I think -- I think that's the way they code
 22 them.
 23 Q. All right.
 24 A. That's probably stretching my knowledge base a
 25 little bit there.

1 Q. Okay. Earlier you indicated that you had
 2 reviewed some designs and some drawings from the
 3 department of transportation in the mid '90s, I believe,
 4 you said?
 5 A. Yes, right.
 6 Q. Did you -- do you know what size of storm those
 7 drawings or designs had anticipated or realized?
 8 A. I really don't. I don't think that information
 9 appears on the drawings. The amount of -- the amount of
 10 information of that type, I think, is pretty limited.
 11 Q. Okay. Did you make any attempt at least -- let
 12 me back up.
 13 MR. HANSEN: Mark this as number three.
 14 EXHIBITS:
 15 (Deposition Exhibit No. 3 marked for
 16 identification.)
 17 MR. HANSEN: Thank you.
 18 Q. (BY MR. HANSEN) Mr. Tutty, I'm handing you
 19 what's been marked as Deposition Exhibit No. 3. This is
 20 a supplemental report that you prepared it looks like
 21 last week or so.
 22 A. Yes.
 23 Q. And this document kind of discusses those Idaho
 24 transportation drawings.
 25 A. Okay.

1 Q. And based on -- and kind of in the second
 2 paragraph about part way down it talks about a
 3 reasonably anticipated storm?
 4 A. Uh-huh.
 5 Q. Can you define for me or identify for me the
 6 size of storm that that references?
 7 A. Well, I think -- can I read this again, please?
 8 Q. Sure. Take your time.
 9 A. Okay. I think in reference to accommodating
 10 the reasonably anticipated stormwater, I think that that
 11 judgment came out of taking the transportation
 12 department's plans and making a rough calculation on the
 13 capacity that the transportation department design would
 14 hold. Now in terms of calculating the anticipated --
 15 reasonably anticipated stormwater above the storm
 16 drains, that's one thing --
 17 Q. (Counsel nods head.)
 18 A. -- to -- it does not really represent
 19 reasonably anticipated storm in terms of a twenty-five
 20 year storm or thirty-five year storm or a hundred-year
 21 storm. I mean, there's -- I made no attempt to track
 22 that. That could -- you know, that could probably be
 23 done, but I didn't --
 24 Q. Okay.
 25 A. -- I didn't approach it from that point of

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Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
 THOMPSON, husband and wife,
 individually and doing business as
 THOMPSON'S AUTO SALES, INC., an
 Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
 subdivision of the State of Idaho,

Defendant.

Case No. CV07-00200

AFFIDAVIT OF JOEL RISTAU

STATE OF Washington)
) ss:
 County of Asotin)

JOEL RISTAU, having been first duly sworn upon oath, deposes and says:

1. That the statements contained herein are made of your Affiant's own
 personal knowledge and are true and correct to the best of his information.

AFFIDAVIT OF JOEL RISTAU - 1

206

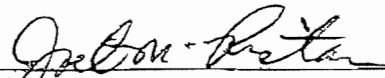
2. I am currently the Public Works Director for Asotin County, Washington. From approximately August, 2000 until December, 2003, I was the Public Works Director for the City of Lewiston, Idaho.

3. In 2003, as the Public Works Director, I was aware of and involved in the 2003 Street Maintenance Project.

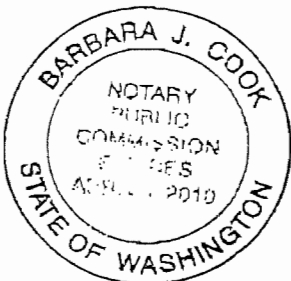
4. In 2003, I was aware of the proposed plan to modify the storm water system at the intersection of Idaho Street and 21st Street in Lewiston, Idaho. From discussions with John Watson and/or Lowell Cutshaw, I had agreed with the plan and John Watson, the Assistant City Engineer, and/or Lowell Cutshaw, the City Engineer had been authorized to prepare plans to modify the storm water system at the intersection of Idaho Street and 21st Street. The new system would replace the then existing valley gutter drain which was causing traffic problems.

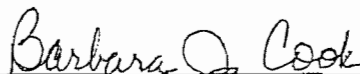
5. Mr. Van Stone was not the Public Works Director for the City of Lewiston in 2003.

FURTHER your Affiant saith naught.


Joel Ristau

SUBSCRIBED AND SWORN to before me this 21st day of April, 2008.




Notary Public for Idaho Washington
Residing at: Lewiston, Idaho
My Commission Expires: 04/30/2010

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2008, I served a true and correct copy of the foregoing **AFFIDAVIT OF JOEL RISTAU** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
CREASON MOORE & DOKKEN
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
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Facsimile: (208) 746-2231

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
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Brian K. Julian

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Brian K. Julian – ISB No. 2360
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awhite@ajhlaw.com

PATTY C. WEEKS
CLERK OF THE DIST. COURT
P. C. Weeks
DEPUTY

Attorneys for DEFENDANT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife, individually
and doing business as THOMPSON'S
AUTO SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political subdivision
of the State of Idaho,

Defendant.

Case No. CV07-00200

AFFIDAVIT OF JOHN WATSON

STATE OF IDAHO)
) ss:
County of _____)

JOHN WATSON, having been first duly sworn upon oath, deposes and says:

1. That the statements contained herein are made of your Affiant's own
personal knowledge and are true and correct to the best of his information.

2. I am a licensed engineer in the State of Idaho. I currently work at Riedesel Engineering in Lewiston, Idaho. In 2003, I was the Assistant City Engineer for the City of Lewiston, Idaho.

3. I prepared the plans for the installation of the bubble-up system at the intersection of 21st Street and Idaho Street.

4. As Assistant City Engineer, I believed and understood that I had authority to prepare and approve such plans, along with the City Engineer.

5. During 2003, the Public Works Director for the City of Lewiston was Joel Ristau. Bud R. Van Stone was no longer the Public Works Director for the City of Lewiston. In 2003, the City Engineer was Lowell Cutshaw.

FURTHER your Affiant saith naught.

John Watson
John Watson

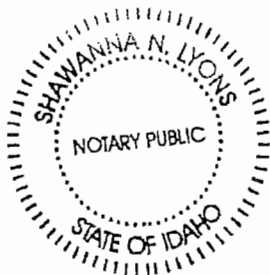
SUBSCRIBED AND SWORN to before me this 21st day of April, 2008.

Shawanna N. Lyons

Notary Public for Idaho
Residing
at: 1308 27th Ave #702 Lewiston, ID 83501
My

Commission

Expires: 3/1/2014

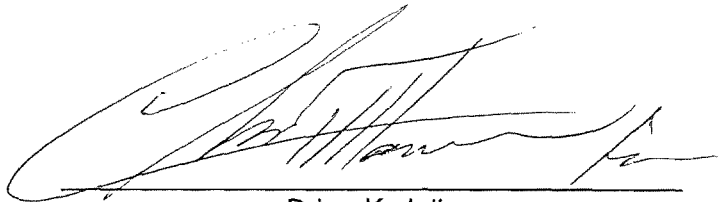


CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2008, I served a true and correct copy of the foregoing **AFFIDAVIT OF JOHN WATSON** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
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☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
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☐ Facsimile (208) 746-2231



Brian K. Julian

2008 APR 24 AM 9 33

PATTY J. WEEKS
CLERK OF THE DIST. COURT
P. J. Weeks
DEPUTY

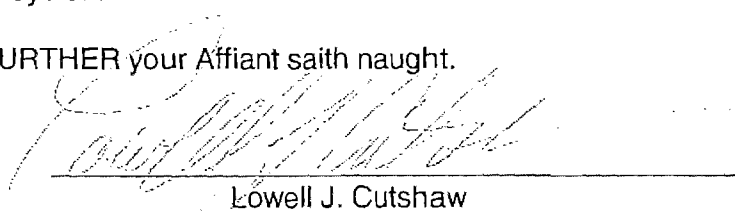
2. I am currently the City Engineer for Watford City, North Dakota. In 2003, I was the City Engineer for the City of Lewiston, Idaho. I was involved in the 2003 Street Maintenance Project.

3. As City Engineer, I had authority to and did approve the installation of the bubble-up system as part of the 2003 Street Maintenance Project. I further had authority to and did approve the plans prepared by the Assistant City Engineer, John Watson, for the installation of the bubble-up system.

4. After reviewing the plans prepared by John Watson, I approved the installation of the bubble-up system.

5. It is my understanding and recollection that the Lewiston City Council approved the 2003 Street Maintenance Project which included the installation of the bubble up system.

FURTHER your Affiant saith naught.



Lowell J. Cutshaw

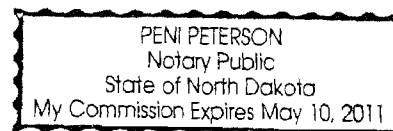
SUBSCRIBED AND SWORN to before me this 22 day of April, 2008.



Notary Public for North Dakota

Residing at: McKenzie County

My Commission Expires: 5-10-2011

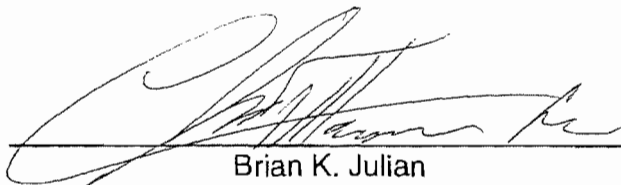


CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of April, 2008, I served a true and correct copy of the foregoing **AFFIDAVIT OF LOWELL CUTSHAW** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Theodore O. Creason
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Brian K. Julian

Theodore O. Creason
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Lewiston, ID 83501
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Fax: (208) 746-2231
Attorneys for Plaintiffs
ISB # 1563

FILED
2008 APR 29 PM 4 23
PATRICIA C. WELLS
CLERK OF THE DISTRICT COURT
Patricia Wells

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.)	
THOMPSON, husband and wife,	)	Case No. CV 07-00200
individually, and THOMPSON'S AUTO)	
SALES, INC., an Idaho corporation,	)	REPLY TO OBJECTION TO
	)	PLAINTIFFS' MOTION FOR
Plaintiffs,	)	RECONSIDERATION AND
	)	OBJECTION TO DEFENDANT'S
vs.	)	MOTION FOR
	)	RECONSIDERATION
CITY OF LEWISTON, a political)	
subdivision in the State of Idaho,)	
)	
Defendant.)	
)	
)	

COME NOW the plaintiffs, Tim K. Thompson, Janet M. Thompson, and Thompson's Auto Sales, Inc., (hereinafter "the Thompsons"), by and through their attorney of record, Theodore O. Creason of Creason, Moore & Dokken, PLLC, and hereby submit their Reply to

Objection to Motion for Reconsideration and Objection to Defendant's Motion for Reconsideration, as follows:

I. A GENUINE ISSUE OF MATERIAL FACT EXISTS ON WHETHER THE CITY'S EMPLOYEES HAD THE AUTHORITY TO MAKE A DISCRETIONARY DECISION TO REPLACE THE VALLEY GUTTER WITH A BUBBLE-UP SYSTEM

The Thompsons brought their Motion for Reconsideration on the basis that none of the affidavits filed by the City in support of its discretionary immunity claim stated that the Assistant City Engineer, John Watson, had authority to make the decision to remove the valley gutter and replace it with a bubble-up system. The Thompsons submitted the Affidavit of Bud R. Van Stone, who was the Public Works Director, stating that he had received approval from the City Manager to install the valley gutter system, and that an Assistant City Engineer would not have had the authority to remove it. The City has now filed additional affidavits of John Watson, Lowell J. Cutshaw and Joel Ristau to support its claim that a person with requisite authority made the decision. However, affidavits obtained by Thompsons from City Council members, the City Manager, and the Mayor of the City of Lewiston make it evident that none of the City's affiants had discretionary authority to remove the valley gutter system.

A. JOHN WATSON DID NOT HAVE DISCRETIONARY AUTHORITY AS ASSISTANT CITY ENGINEER TO REPLACE THE VALLEY GUTTER SYSTEM.

It now becomes apparent from the City's own affidavits that John Watson did not have authority to make the discretionary decision. His affidavit simply states "[a]s Assistant City Engineer, I believed and understood that I had authority to prepare and approve such plans, along with the City Engineer." (See April 21, 2008 Aff. of Watson, ¶ 4). The issue is not whether Mr. Watson had the authority to prepare and approve the plans, it is whether he had discretionary

authority to replace the valley gutter system with the bubble-up system. In fact, he admits that only along with the City Engineer would he have the ability to prepare and approve such plans. John Watson alone did not have the authority to make the discretionary decision. The City has filed other affidavits by former City employees wherein it is implied that they had discretionary authority.

B. THE CITY'S OTHER AFFIANTS HAVE NOT DEMONSTRATED THAT THEY HAVE THE AUTHORITY TO REPLACE THE VALLEY GUTTER SYSTEM THAT WAS APPROVED BY THE CITY MANAGER.

The City argues that Mr. Van Stone's affidavit is irrelevant since he was the Public Works Director at the time the valley gutter was installed and not at the time the bubble-up system replaced it. The City misperceives the significance of Mr. Van Stone's affidavit. It is uncontested that he as Public Works Director along with the City Manager, Jan Vassar, made the policy decision to implement and install the valley gutter system to prevent flooding on 21st Street. (See Aff. of Van Stone, ¶ 3 & Aff. of Janice Vassar, ¶ 6). None of the City's affiants testify that they have the authority to "undo" a policy decision that was made by the Lewiston City Manager.

Joel Ristau, who was the Public Works Director for the City at the time the valley gutter was replaced, testifies that

I had agreed with the plan and John Watson, the Assistant City Engineer, and/or Lowell Cutshaw, the City Engineer had been authorized to prepare plans to modify the storm water system at the intersection of Idaho and 21st Street. The new system would replace the then existing valley gutter drain which was causing traffic problems. (See Aff. of Ristau, ¶ 4).

What Mr. Ristau does not state is who authorized the City Engineer and the Assistant City Engineer to make such a modification. It should be noted that Mr. Ristau has not been named as

a person with knowledge by the City in this case. (*See* April 29, 2008 Aff. of Creason, ¶ 3). The City should not be allowed to use Mr. Ristau's affidavit testimony without first making him available for deposition. Furthermore, as part of Thompsons' fact investigation, Mr. Ristau was interviewed and correspondence was exchanged with him regarding the removal of the valley gutter. (*See* April 29, 2008 Aff. of Creason, ¶ 5). During the investigation, counsel for the Thompsons learned that Mr. Ristau did not believe "the Engineering Department had the authority to prefer the 'bubble-up' system over the valley gutter if the bubble up system was going to handle substantially less flow and expose property owners to significant additional flood risk." (*See* April 29, 2008 Aff. of Creason, ¶ 7, Exh. 1). During the investigation Mr. Ristau also agreed that "if the effectiveness of the bubble up system had been known to lessen the efficiency or functional capacity of the storm drain system, the discretionary call would not have been a discretionary call for the engineers." (*See Id.*). Mr. Ristau's affidavit does not state that he had authority to make the discretionary decision to replace the valley gutter, it does not state that the City Manager was consulted, and it does not say who allegedly gave the City Engineers authority to make the discretionary decision to replace the valley gutter.

The City Engineer at the time of the removal of the valley gutter was Lowell J. Cutshaw. (*See* Aff. of Cutshaw, ¶ 2). Mr. Cutshaw expressly states that he had the discretionary authority to remove the valley gutter and to replace it with the bubble-up system as follows:

As City Engineer, I had authority to and did approve the installation of the bubble-up system as part of the 2003 Street Maintenance Project. I further had authority to and did approve the plans prepared by the Assistant City Engineer, John Watson, for the installation of the bubble-up system. (*See* Aff. of Cutshaw, ¶ 3).

Mr. Cutshaw's bare statement that he had discretionary authority in this case is problematic for several reasons.

First, the Affidavit of Joel Ristau indicates that "the City Engineer had been authorized to prepare plans to modify the storm water system at the intersection of Idaho Street and 21st Street." (*See* Aff. of Ristau, ¶ 4). This indicates that authorization was required to be given to the City Engineer, but does not state who gave that authority. Neither does it say that Mr. Cutshaw had the authority to approve the installation of the bubble-up system, although Mr. Cutshaw himself claims such authority. (*See* Aff. of Cutshaw, ¶ 4). Interestingly enough, Mr. Cutshaw ends his affidavit with the following: "It is my understanding and recollection that the Lewiston City Council approved the 2003 Street Maintenance Project which included the installation of the bubble up system." (*See* Aff. of Cutshaw, ¶ 5). It appears then, in spite of Mr. Cutshaw's assertions that he had discretionary authority, that he believed it derived from the Lewiston City Council. However, Thompsons' affiants state otherwise.

C. THE CITY COUNCIL, THE MAYOR OF THE CITY OF LEWISTON, AND THE LEWISTON CITY MANAGER WERE NOT CONSULTED ABOUT THE REMOVAL OF THE VALLEY GUTTER SYSTEM.

The City Manager, Jan Vassar, states that she recommended and "approved the concept of an installation to solve the run-off of water across Idaho Street from the southwest corner of the intersection of 21st and Idaho Street to the northwest corner of the intersection between Idaho and 21st Street." (*See* Aff. of Vassar, ¶ 6). Ms. Vassar was also the City Manager in 2003 when the valley gutter was removed, and has no recollection of being consulted about the removal of the valley gutter. (*See* Aff. of Vassar, ¶ 8). Although the City Engineer and the Public Works Director would have authority to approve maintenance projects, they did not have authority to

engage in “substantial redesign of infrastructure or project[s] with a significant policy component [which] would have required approval by the City Manager’s office and perhaps the City Council.” (See Aff. of Vassar, ¶ 9). City Council members Kevin Poole and Richard McMillen, as well as Mayor Jeff Nasset do not believe that approval for removal of the valley gutter was sought or received from them. (See Aff. of Jeff Nasset, ¶ 2 & ¶ 3; Aff. of McMillen ¶ 4 & ¶ 5; and Aff. of Poole, ¶ 4 & ¶ 5).

It is apparent that the City staff did not present the issue of the removal of the valley gutter to the City Manager or any of the City Council, including the Mayor. In fact, as set forth in Thompsons’ Motion for Reconsideration, there is no evidence that the City staff even provided the plans for the 2003 Street Maintenance Project to the City Council. A genuine issue of material fact exists as to whether the City Engineer had the authority to reverse a discretionary decision that was made between the former Public Works Director and the City Manager to alleviate flooding on 21st Street with the valley gutter system.

II. THE CITY DID NOT PROPERLY RAISE THE ISSUE OF NEGLIGENT MAINTENANCE IN ITS MOTION FOR SUMMARY JUDGMENT, AND EVEN IF IT HAD, GENUINE ISSUES OF MATERIAL FACT EXIST FOR TRIAL

The City in its Motion for Reconsideration requests the “Court for an order reconsidering its denial of its Motion for Summary Judgment with regard to negligent maintenance in the above-entitled matter.” (See City’s Motion for Reconsideration, p.1). The City inadvertently mischaracterizes its own filings in this matter. There are also genuine issues of fact on the negligent maintenance issue.

A. THE CITY IS NOT ENTITLED TO REQUEST SUMMARY JUDGMENT ON ISSUES THAT IT RAISES FOR THE FIRST TIME IN ITS REPLY BRIEF AND IN ITS MOTION FOR RECONSIDERATION.

The City made no request in its Motion for Summary Judgment on the issue of negligent maintenance. The City provided no affidavit testimony opposing the claim with its Motion for Summary Judgment. The first time that the issue of negligent maintenance was raised was in Thompsons' Response to Defendant's Motion for Summary Judgment at p. 12-13 which reads in its entirety as follows:

One of the Thompsons' claims in this case is that the City did not keep the storm sewer system at the Idaho Street Intersection clean, which contributed to the flooding that damaged the Thompsons' property. (*See Aff. of Tutty*, ¶4(d)). The City has not argued that it is entitled to immunity for failure to keep the system clean and, therefore, it is not entitled to summary judgment on that claim.

The Thompsons did not provide any evidence on the issue because it was never raised by the City.

The City for the first time raised its defense to the negligent maintenance claim in its reply brief (*See Defendant's Reply in Support of Motion for Summary Judgment*, p. 10-13). As a general proposition a court "will not consider issues argued for the first time in the reply brief." *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005).

In the City's Memorandum in Support of Motion for Reconsideration it raises a wide variety of issues that are in no wise related to its original claims of immunity in its Motion for Summary Judgment. It now argues that the plaintiffs cannot prove as a matter of law the element of causation. (*See Memo. in Support of Mot. for Recon.*, p. 8-9). It claims that the City is entitled to a finding that there is no negligence on its part as a matter of law. (*See Mem. in Support of Mot. for Recon.*, ¶ 7). The City never argued a defense of immunity for negligent

maintenance in its Motion for Summary Judgment, much less that there is no issue of fact on the elements of negligence and causation. If the City wants summary judgment on these issues, it should be required to follow the summary judgment provisions of Rule 56. In any case, genuine issues of material fact exist on all of the new claims that the City raised in its reply brief and its Motion for Reconsideration.

B. MR. TUTTY'S TESTIMONY AND THE CITY'S FAILURE TO PROVIDE RELEVANT REQUESTED DOCUMENTATION RAISE GENUINE ISSUES OF MATERIAL FACT ON THOMPSONS' NEGLIGENT MAINTENANCE CLAIM.

The City is extraordinarily selective in the deposition testimony that it provides to the Court. Mr. Bingham started his first day as Maintenance Manager for the City of Lewiston on May 19, 2006, the day that the Thompsons' property flooded. (*See Depo. of Bingman*, p. 20, l. 21 – p. 21, l. 9). Mr. Bingham testified that the City tracks maintenance of its storm sewers by area as follows: “So, if we had done storm-system work – storm systems in a specific area, and when those – that’s when we would enter into our database that we cleaned the storm systems on this area on this date and . . .” (*See Depo. of Bingman*, p. 18, ll. 16-24). Mr. Bingham was then specifically asked whether he had reviewed any documents in preparation for the deposition, and if so, what those documents were. Mr. Bingham listed several items. (*See Depo. of Bingman*, p. 19, ll.11-19). The following exchange took place:

Q. Okay. And did you separate out those things that you reviewed that you just described to me?

A. Did I separate them out?

Q. I’m going to ask Counsel to provide me with a copy of those things that you reviewed?

A. Uh-huh.

Q. I'm just wondering if -- you didn't bring them with you today, I take it?

A. No.

Q. And did you keep them in a separate -- did you segregate them out so you can identify them for the City's lawyers?

A. Yeah.

Q. So, I can have copies of them?

A. Sure.

(See Bingman Depo., p. 19, l. 20 – p. 20, l. 9). To date, counsel for the Thompsons has not received the documentation requested.

The deposition of Mr. Tutty, Thompsons' expert engineer, was taken the day after Mr. Bingman's. Mr. Tutty testified that the level of leaf debris in the bubble-up system is unacceptable and is a result of the lack of maintenance by the City. (See Tutty Depo., p. 39, l. 4 – p. 40, l. 12). The following conversation then occurred between counsel for the City and Mr. Tutty:

Q. Okay. And what is your understanding as to what maintenance program, if any, that the City has for its storm-gutter system?

A. Well, I looked -- the City gave me a copy of its maintenance reports, and it's difficult sometimes for me to draw conclusions as to what they were doing, where they were doing it, what date it was being done, and that the data is not consistently recorded.

But I would say what the City does do is probably drop an -- it's sort of like a Shop Vac type of arrangement except it's a big Shop Vac, and it's mounted on a truck and it's got maybe an eight-inch suction -- flexible suction pipe. Life off the grate, drop it into the basin, turn on the vacuum, suck everything out of the bottom of the basin, turn it off, pull it out, put the grate back on.

Q. All right. And do you have any understanding as to how often that occurs?

A. That's the problem I found with the records. I couldn't tell from the records they gave me. I couldn't tell really where they are exactly working. There's conflicts between activity dates, location, points, geographic location data. I don't think there's any time of day or anything like that. But it is very inconsistent. So I can't – I don't think I can answer that question any more directly.

Q. All right. Yesterday the deposition of Mr. KEITH BINGMAN was taken. Do you know Mr. Bingman?

A. I don't know that I have met him, no.

Q. Okay. Did you as part of your investigation talk with anybody at the City of Lewiston about their maintenance schedule other than getting the records for the storm-drain system?

A. No. I have not done that.

(See Aff. of Tutty, p. 40, l. 13 – p. 41, l. 21).

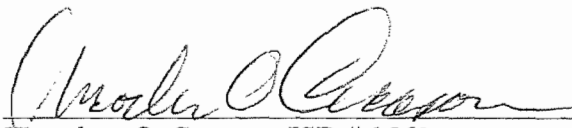
Mr. Bingman never did testify that the City's records indicated that it had maintained the pipe in accordance with its schedule, and Mr. Tutty testified that the City's maintenance records that he received are inconsistent. Furthermore, it appears that Mr. Bingman reviewed relevant records that have not yet been provided to the Thompsons for Mr. Tutty to review. Finally, plaintiff, Mr. Tim Thompson, testifies that he has owned Thompson's Auto Sales since May 2001, and the only time he has ever seen the City clean the storm sewer at the intersection in question was on Sunday, March 30, 2008. (See Aff. of Thompson, ¶ 4). Regardless of the City's failure to raise these issues in its Motion for Summary Judgment, there are genuine issues of material fact with respect to Thompson's negligent maintenance claim.

III. CONCLUSION

For the above and foregoing reasons, Thompsons' Motion for Reconsideration should be granted, denying the City summary judgment on its discretionary immunity claim, and the City's Motion for Reconsideration should be denied on the basis that genuine issues of material fact exist for trial.

DATED this 29th day of April, 2008.

CREASON, MOORE & DOKKEN, PLLC



Theodore O. Creason, ISB # 1563

Attorney for Plaintiffs


Tim K. Thompson and Janet M. Thompson,
and Thompson's Auto Sales, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2008, a copy of the foregoing
REPLY TO OBJECTION TO PLAINTIFFS' MOTION FOR RECONSIDERATION AND
OBJECTION TO DEFENDANT'S MOTION FOR RECONSIDERATION PLAINTIFFS'
MOTION FOR RECONSIDERATION was served by the method indicated below, and
addressed to the following:

Brian K. Julian
Stephen L. Adams
Chris H. Hansen
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 South Fifth Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426

 X FIRST-CLASS MAIL
 HAND DELIVERED
 OVERNIGHT MAIL
 FAX TRANSMISSION (208)344-5510


Theodore O. Creason

Theodore O. Creason
CREASON, MOORE & DOKKEN, PLLC
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P.O. Drawer 835
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(208) 743-1516
Fax: (208) 746-2231
Attorneys for Plaintiffs
ISB # 1563

FILED
2008 APR 29 PM 4 23
PATTY G. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

TIM K. THOMPSON and JANET M.
THOMPSON, husband and wife,
individually, and THOMPSON'S AUTO
SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision in the State of Idaho,

Defendant.

)
) Case No. CV 07-00200
)
) AFFIDAVIT OF TIM THOMPSON
) IN SUPPORT OF REPLY TO
) OBJECTION TO PLAINTIFFS'
) MOTION FOR
) RECONSIDERATION AND
) OBJECTION TO DEFENDANT'S
) MOTION FOR
) RECONSIDERATION
)
)
)

STATE OF IDAHO)
: ss.
County of Nez Perce)

Tim Thompson, being first duly sworn, deposes and says:

1. Affiant is the owner and operator of Thompson's Auto Sales, Inc. and the owner of the real property which Thompson's Auto operates located at 306 21st Street, Lewiston, Idaho.

AFFIDAVIT OF TIM THOMPSON IN SUPPORT OF REPLY
TO OBJECTION TO PLAINTIFFS' MOTION FOR
RECONSIDERATION AND OBJECTION TO DEFENDANTS'
MOTION FOR RECONSIDERATION - Page 1

toc/thompson_auto/pleading/affidavit_thompson

Creason, Moore & Dokken, PLLC
P.O. Drawer 835, Lewiston, ID 83501
(208) 743-1516; Fax: (208) 746-2231

227

2. As the owner and operator of Thompson's Auto Sales, Inc., affiant maintains an office at 306 21st Street, Lewiston, Idaho. Affiant's office is located on the second floor of the building with large windows looking eastward toward the intersection of Idaho Street and 21st Street in Lewiston, at a distance of about 75 yards from the intersection.

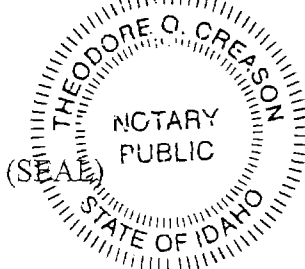
3. Most of affiant's car lot is visible from affiant's large office windows, and affiant observes the lot and intersection six and sometimes seven days a week and has since prior to the time in the summer of 2003 when the City of Lewiston, as part of the 2003 Street Maintenance Project, removed the valley gutter crossing Idaho Street at its intersection with 21st Street and installed two catch basins and an underground pipe in its place.

4. Since the maintenance project by the City in the summer of 2003, the City has done no further maintenance work on any part of the installation until approximately 11:00 a.m. on Sunday, March 30, 2008. At that time the City crew did some cleaning work on the lower catch basin but did not do anything at the catch basin and grate located at the southwest corner of the intersection, nor did they do anything to flush out the pipe.

DATED this 29th day of April, 2008.

Tim Thompson
Tim Thompson

SUBSCRIBED AND SWORN to before me this 29th day of April, 2008.




Theodore Q. Creason
Notary Public in and for said State,
Residing at or employed in Lewiston.
My Commission Expires 9-28-09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2008, a copy of the foregoing AFFIDAVIT OF TIM THOMPSON IN SUPPORT OF REPLY TO OBJECTION TO PLAINTIFFS' MOTION FOR RECONSIDERATION AND OBJECTION TO DEFENDANT'S MOTION FOR RECONSIDERATION was served by the method indicated below, and addressed to the following:

Brian K. Julian
Stephen L. Adams
Chris H. Hansen
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 South Fifth Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426

 X FIRST-CLASS MAIL
 HAND DELIVERED
 OVERNIGHT MAIL
 FAX TRANSMISSION (208)344-5510


Theodore O. Creason

FILED
2008 APR 29 PM 4 23
FIFTY-ONE WEEKS
CLERK OF THE DIST. COURT
JERRY ROGERS
CLERK

TIM K. THOMPSON and JANET M. THOMPSON, husband and wife,
individually, and THOMPSON'S AUTO SALES, INC., an Idaho corporation,

Plaintiffs,

vs.

CITY OF LEWISTON, a political
subdivision in the State of Idaho,

Defendant.

Theodore O. Creason, being first duly sworn, deposes and says:

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2. In response to plaintiffs' discovery requests, defendant City of Lewiston has identified a number of employees and former employees of the City of Lewiston as individuals likely to have discoverable information that it may use to support its claims or defenses.

3. At no time during discovery has defendant identified Joel Ristau as an individual likely to have discoverable information that defendant may use to support its claims or defenses.

4. Despite defendant's failure to identify Joel Ristau as an individual likely to have discoverable information that defendant may use to support its claims or defenses, defendant City of Lewiston in its Affidavit of Chris H. Hansen in Support of Motion for Reconsideration has submitted the Affidavit of Joel Ristau.

5. As part of affiant's investigation of facts on behalf of plaintiff, affiant interviewed and exchanged correspondence with Joel Ristau relative to whether a policy decision was made to remove the valley gutter that had been previously installed across Idaho Street at its intersection with 21st Street.

6. Based on affiant's interview and subsequent exchange of correspondence, affiant concluded that no policy decision to remove the valley gutter was made, but rather that City Engineering concluded, albeit erroneously, that the installation made as part of the 2003 Street Maintenance Project did not change the functional capacity of the storm water installation already in place.

7. Attached hereto as Exhibit A is affiant's follow-up correspondence and Joel Ristau's reply. Affiant on behalf of the plaintiffs has not sought to take the deposition of Joel Ristau in light of the fact that he has not been named as a person with knowledge. However, unless defendant City of Lewiston withdraws the Affidavit of Joel Ristau or identifies Joel Ristau as a person with knowledge, affiant requests leave of Court to obtain the deposition of Joel

Ristau in order to fully and accurately develop germane facts and background concerning the decision to remove the valley gutter.

8. Attached hereto as Exhibit B is a true and correct copy of page 20, line 21 through page 21, line 9, from the deposition transcript of Keith Bingman dated January 15, 2008.

9. Attached hereto as Exhibit C is a true and correct copy of page 18, lines 16 through 24, from the deposition transcript of Keith Bingman dated January 15, 2008.


10. Attached hereto as Exhibit D is a true and correct copy of page 19, lines 11 through 19, from the deposition transcript of Keith Bingman dated January 15, 2008.

11. Attached hereto as Exhibit E is a true and correct copy of page 19, line 20 through page 20, line 9, from the deposition transcript of Keith Bingman dated January 15, 2008.

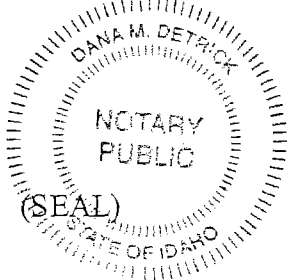
12. Attached hereto as Exhibit F is a true and correct copy of page 39, line 4 through page 40, line 12, from the deposition transcript of Roger Tutty dated January 16, 2008.

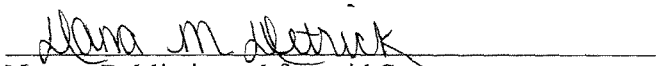
13. Attached hereto as Exhibit G is a true and correct copy page 40, line 13 through page 41, line 21, from the deposition transcript of Roger Tutty dated January 16, 2008.

DATED this 29th day of April, 2008.


Theodore O. Creason

SUBSCRIBED AND SWORN to before me this 29th day of April, 2008.




Notary Public in and for said State,
Residing at or employed in Lewiston.
My Commission Expires 06/10/2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2008, a copy of the foregoing AFFIDAVIT OF THEODORE O. CREASON was served by the method indicated below, and addressed to the following:

Brian K. Julian
Stephen L. Adams
Chris H. Hansen
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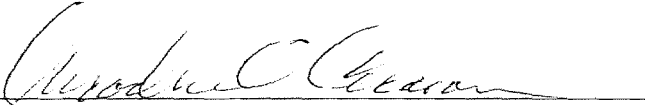

Theodore O. Creason

EXHIBIT A

CREASON, MOORE & DOKKEN, PLLC

LAWYERS

1219 IDAHO STREET

P.O. DRAWER 835

LEWISTON, IDAHO 83501-0835

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(1928-1988)
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*ADMITTED IN IDAHO AND WASHINGTON

March 28, 2008

Joel Ristau
Public Works Director
Asotin County Courthouse
P. O. Box 160
Asotin, WA 99402

Re: Thompson v. City of Lewiston
Nez Perce County Case No. CV07-00200

Dear Joel:

Thank you for taking the time to talk to me yesterday afternoon. I appreciated your willingness to share your perspective as a Professional Engineer and as a Public Works Director concerning governmental immunities applicable to public works projects.

As I explained to you, my focus on this issue arises out of a lawsuit I am handling on behalf of Thompson's Auto Sales here in Lewiston. My clients' contention is that they suffered serious flood damage from city storm water on May 19, 2006 when surface storm water came down the west side of 21st Street, then left the surface gutter at the southwest corner of the intersection of 21st and Idaho Streets, then flowed northwest across Idaho Street and entered the Thompson property and caused the damage. Our evidence shows that at the behest of the City of Lewiston the Idaho Transportation Department, as part of its modernization of the intersection of G Street and U.S. 12, installed a surface valley gutter across Idaho Street on the west side of 21st in the early 1990's due to a chronic flooding problem that had developed during storm events. However, in May of 2003, as a part of the 2003 Street Maintenance Project, the City removed the surface valley gutter and installed a "bubble up" system. Our evidence will show that the bubble up system did not work because the intake catch basin was not designed or installed in a manner that would allow storm water in any significant quantity to enter the 12" pipe that was laid under Idaho Street in the area where the valley gutter had been.

AFFIDAVIT OF THEODORE O. CREASON

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Joel Ristau
March 28, 2008
Page 2

On behalf of my clients I will argue the City was negligent in the maintenance of this area of its storm drain system in that among other things it replaced a functional valley gutter with a bubble up system that would not handle the same capacity of storm water. I will of course point out that our experts are of the opinion that the flood damage to Thompson's Auto Sales would not have occurred had the 2003 Street Maintenance Project not included the removal of the valley gutter.

It appears that the City, because it is a governmental entity, could be immune from damages caused by this misstep if it can show that instead there was a discretionary decision to choose between traffic safety and flood control. Thus, at this point in the litigation I am focusing attention on whether there was actually a discretionary decision made to prefer a less satisfactory storm water management design in order to accommodate a traffic problem. Although I have seen some evidence that there was a perceived traffic problem, it seems apparent to me that neither the City's Engineers nor the Public Works Director (you at that time) were weighing the merit of one approach against the other since there was an assumption that the bubble up system did not materially change the functional capacity of the system. My understanding from talking to you is that had the issue been presented to you as preferring one against the other, you as Public Works Director would have wanted more information about the extent to which the storm drain system would be limited and what that would mean in terms of additional flood risk. In other words, I came away from our discussion satisfied that you do not believe you exercised any discretion in preferring one system over another in order to solve a problem since there was no understanding that the maintenance project was actually going to alter the functional capacity of the system. It is also my understanding from our discussion that you do not believe the Engineering Department had the authority to prefer the "bubble-up" system over the valley gutter if the bubble up system was going to handle substantially less flow and expose property owners to significant additional flood risk.

I realize that you have the highest respect for the engineers that worked for you at the City of Lewiston, and I know that you believe the engineer asked to make the drawings for the bubble up system is one of the finest you have worked with. I certainly do not expect you to express a professional opinion critical of his work. It may be that the City can, despite our evidence to the contrary, persuade the jury that the bubble up system that is there is actually as good as the valley gutter. Nevertheless, my understanding is that we agree that if the effectiveness of the bubble up system had been known to lessen the efficiency or functional capacity of the storm drain system, the discretionary call would not have been a discretionary call for the engineers.

As I said, it very well may be that you will be asked to be a witness in this case, and I have appreciated the opportunity to get to understand your memory and perspective on this

Joel Ristau
March 28, 2008
Page 3

issue. If I have misstated or misunderstood your memory or position on this, please let me know right away.

Thank you again for your time and attention to this.

Very truly yours,

CREASON, MOORE & DOKKEN, PLLC


Theodore O. Creason

TOC:dd
bcc: Tim Thompson
thompson's_auto/corres/ristau_001



Asotin County
PUBLIC WORKS DEPARTMENT
P.O. Box 160
Asotin, Washington 99402-0160
Phone: (509) 243-2074
Fax: (509) 243-2003

County Roads

Sewer Department

Solid Waste Department

April 2, 2008

RECEIVED

APR 03 2008

Creason, Moore, & Dokken, PLLC

Theodore Creason
Creason, Moore & Dokken, PLLC
1219 Idaho Street
P.O. Drawer 835
Lewiston, Idaho 83501-0835

Re: Thompson v. City of Lewiston

Dear Ted;

I appreciated talking to you the other day about the above-referenced case, and received your follow-up written summary of our conversation. I believe your summary was for the most part a fair assessment of what we discussed. However, I would exercise caution in making definitive conclusions about decision-making at the City (at least while I was there) based on discussions such as these. There are many judgments, as well as issues such as relative topic magnitude and working relationship/staff confidence that are involved in staff decision-making processes. Our meeting would not allow the time to cover all of these nuances, and of course many of them would be the topics of argument as part of your case.

In any event, I appreciated the meeting and thanks for the follow-up.

Sincerely,

Joel M. Ristau, PE
Asotin County Public Works Director

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AFFIDAVIT OF THEODORE O. CREASON



RECYCLED PAPER

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EXHIBIT B

21 Q. Okay. Do you recall the date that the storm
22 happened that flooded Thompson Auto?
23 A. Yes.
24 Q. What was that date?
25 A. May 19th, 2006.

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1 Q. Were you on duty that day?
2 A. Yes.
3 Q. Okay. Was Mike Chamberlin on duty also?
4 A. He had retired by then, so....
5 Q. Were you then already the appointed street
6 maintenance manager?
7 A. Yes.
8 Q. Must have been like the first day of the job?
9 A. May 19th.

EXHIBIT C

16 Q. Is there any check-off list of any kind that
17 you could look at and go back and verify that a certain
18 part of the storm sewer had received its regular
19 inspection and maintenance?
20 A. We just track them. We track them by area.
21 So, if we had done storm-system work -- storm systems in
22 a specific area, and when those - that's what we would
23 enter into our database that we cleaned the storm
24 systems on this area on this date and....

EXHIBIT D

11 Q. Okay. And did you review any documents in
12 preparation for this deposition today?

13 A. Yes.

14 Q. And what documents did you -- did you review?

15 A. I went back and took a look at our weather
16 records, went through a log of phone calls that my
17 office received during that storm, went through the
18 reports that I had done on that storm system down here,
19 what I had been asked for.

EXHIBIT E

20 Q. Okay. And did you separate out those things
21 that you reviewed that you just described to me?
22 A. Did I separate them out?
23 Q. I'm going to ask Counsel to provide me a copy
24 of those things that you reviewed?
25 A. Uh-huh.

Page 20

1 Q. I'm just wondering if -- - you didn't bring
2 them with you today, I take it?
3 A. No.
4 Q. And did you keep them in a separate -- did you
5 segregate them out so you can identify them for the
6 City's lawyers?
7 A. Yeah.
8 Q. So, I can have copies of them?
9 A. Sure.

EXHIBIT F

4 Q. Was the leaf level above or below this water
5 outlet pipe?

6 A. Well, it depends on -- I've visited the catch
7 basin quite a few times during the last year.

8 Q. Okay.

9 A. And it depends -- you know, it varies.
10 Sometimes the leaf level and the outlet, the whole
11 outlet is exposed to view, the entire depth of the
12 outlet. Sometimes the leaf level is sitting up there a
13 third of the way or half of the way up the diameter of
14 the pipe, the outlet pipe. I have seen on occasion leaf
15 material that's trying to get in through the grate. You
16 know, it hasn't made it yet, but probably some came down
17 through the end of a run-off period and there was no
18 additional water to push it in.

19 Q. And since you visited, at least the southwest
20 grate on a number of occasions, my impression is that
21 the level or the amount of debris that you're seeing in
22 the catch basin seems to change?

23 A. Uh-huh, yeah.

24 Q. Is that correct?

25 A. Yes.

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1 Q. Could that change be caused by maintenance
2 being conducted by the City?

3 MR. CREASON: Object to the form, calls for
4 speculation, but you can answer if you can.

5 A. Well, I think to be specific in terms of an
6 opinion.

7 Q. Sure.

8 A. I don't think the level of leaf debris is the
9 result of maintenance by the City.

10 Q. Okay.

11 A. I think the level of leaf debris is a result of
12 the lack of maintenance by the City.

EXHIBIT G

13 Q. Okay. And what is your understanding as to
14 what maintenance program, if any, that the City has for
15 its storm-gutter system?

16 A. Well, I looked -- the City gave me a copy of
17 its maintenance reports, and it's difficult sometimes
18 for me to draw conclusions as to what they were doing,
19 where they were doing it, what date it was being done,
20 and that data is not consistently recorded.

21 But I would say what the City does do is
22 probably drop an -- it's sort of like a Shop Vac type of
23 arrangement except it's a big Shop Vac, and it's mounted
24 on a truck and it's got maybe an eight-inch suction --
25 flexible suction pipe. Lift off the grate, drop it into

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1 the basin, turn on the vacuum, suck everything thing out
2 of the bottom of the basin, turn it off, pull it out,
3 put the grate back on.

4 Q. All right. And do you have any understanding
5 as to how often that occurs?

6 A. That's the problem I found with the records. I
7 couldn't tell from the records they gave me. I couldn't
8 tell really where they are exactly working. There's
9 conflicts between activity dates, location, points,
10 geographic location data. I don't think there's any
11 time of day or anything like that. But it is very
12 inconsistent. So I can't -- I don't think I can answer
13 that question any more directly.

14 Q. All right. Yesterday the deposition of
15 Mr. ROGER TUTTY was taken. Do you know Mr. Bingman?

16 A. I don't know that I have met him, no.

17 Q. Okay. Did you as a part of your investigation
18 talk with anybody at the City of Lewiston about their
19 maintenance schedule other than getting the records for
20 the storm-drain system?

21 A. No. I have not done that.